BellSouth Telecommunications, Inc.
Legal Department
1600 Williams Street
Suite 5200
Columbia, SC 29201

patrick.turner@bellsouth.com

Patrick W. Turner
General Counsel-South Carolina

803 401 2900
Fax 803 254 1731

July 27, 2006

The Honorable Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: Joint Petition for Arbitration of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius [Affiliates] an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended
Docket No. 2005-57-C

Dear Mr. Terreni:

Enclosed for filing are the original and one (1) copy of BellSouth Telecommunications, Inc.'s Post-Hearing Brief in the above-referenced matter. This document is an exact duplicate of the e-filed copy submitted to the Commission in accordance with its electronic filing instructions. By copy of this letter, I am serving all parties of record with a copy of this document as indicated on the attached Certificate of Service. By separate cover, BellSouth also is submitting a Proposed Order for the Commission's consideration.

Sincerely,

Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record
DM5 # 640749

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

In the Matter of	)	
	)	
Joint Petition for Arbitration of	)	
	)	
NewSouth Communications, Corp.,	)	Docket No. 2005-57-C
NuVox Communications, Inc.	)	
KMC Telecom V, Inc., KMC Telecom III LLC, and	)	
Xspedius Communications, LLC on Behalf of its	)	
Operating Subsidiaries Xspedius Management Co.	)	
Switched Services, LLC and Xspedius Management Co. of	)	
Charleston, LLC, Xspedius Management Co. of Columbia,	)	
LLC, Xspedius Management Co. Of Greenville,	)	
LLC, and Xspedius Management Co. of Spartanburg, LLC	)	
	)	
Of an Interconnection Agreement with	)	
BellSouth Telecommunications, Inc.	)	
Pursuant to Section 252(b) of the	)	
Communications Act of 1934, as Amended	)	
	)	

BELLSOUTH TELECOMMUNICATIONS, INC.
POST-HEARING BRIEF

PATRICK W. TURNER
General Counsel-South Carolina
1600 Williams Street
Columbia, South Carolina 29201
(803) 401-2900

ROBERT A. CULPEPPER
BellSouth Center - Suite 4300
675 West Peachtree Street, N.E.
Atlanta, GA 30375
(404) 335-0841

ATTORNEYS FOR
BELLSOUTH TELECOMMUNICATIONS, INC.

TABLE OF CONTENTS

I. INTRODUCTION

The Joint Petitioners[1] have candidly acknowledged that "[t]hroughout these negotiations the joint petitioners have held tight to the principle that they will not give up something for nothing."[2] In light of this negotiation strategy, it is not surprising that the unresolved issues the Joint Petitioners have raised in this arbitration proceeding share the following five common characteristics:

1. the Joint Petitioners want greater rights than what BellSouth Telecommunications, Inc. ("BellSouth") offers to its end users or even what the Joint Petitioners offer to their own end users;

2. the Joint Petitioners are arbitrating issues based upon hypothetical concerns or speculation and not actual business experience;

3. the Joint Petitioners attempt, without justification, to change established industry standards;

4. the Joint Petitioners seek to inject "commercial business practices" into their interconnection agreement even though numerous tribunals have acknowledged that interconnection agreements are not typical commercial contracts; and

5. the Joint Petitioners demand rights irrespective of whether the Telecommunications Act of 1996 (the "1996 Act" of "the Act") obligates BellSouth to provide them.

---

[1] As used in this Brief, the term "Joint Petitioners" refers collectively to Xspedius Communications, LLC ("Xspedius") and NewSouth Communications Corp. ("NewSouth"), which during the course of this proceeding merged with NuVox Communications, Inc. ("NuVox"), with the surviving entity being NuVox. Originally, KMC Telecom V, Inc. and KMC Telecom III, LLC also were parties to this arbitration proceeding. However, on May 27, 2005, the KMC entities withdrew their petition for arbitration, and the Commission subsequently accepted KMC's withdrawal with prejudice. (SC Tr. at 12-13). Thus, the KMC entities are no longer parties to this proceeding.

[2] FL Tr. at 22. By Directive dated May 31, 2005, the Hearing Officer granted – with one exception -- the parties' joint motion regarding hearing procedure. Accordingly, the record in this proceeding includes: the hearing transcript (including exhibits) from the Florida and Georgia proceedings; the parties' responses to Florida Staff Discovery Requests; the parties' responses to Discovery Requests submitted by the other party; and the depositions (including exhibits) taken by the parties and by the Florida Staff. In this Brief, BellSouth will identify the state transcript or hearing exhibit being referred to as FL, GA, or SC, followed by the transcript or exhibit cite.

The controlling provisions of the 1996 Act, however, do not entitle the Joint Petitioners to what they seek. BellSouth, therefore, respectfully requests that the Public Service Commission of South Carolina ("the Commission") reject the Joint Petitioners' arguments and proposed language, and accept BellSouth's arguments and proposed language, on each of the remaining unresolved issues in this proceeding.

II. PROCEDURAL BACKGROUND

The Joint Petitioners initially filed their Petition for Arbitration ("Initial Petition") with the Commission on February 11, 2004.[3] BellSouth filed its Response to the Initial Petition on March 8, 2004.[4] On October 6, 2004, the Commission entered an Order granting the Parties' Joint Motion to withdraw the Initial Petition "without prejudice, and under the terms stated in the Joint Motion to Withdraw."[5]

In accordance with that Order, the Joint Petitioners subsequently filed the Petition for Arbitration ("Petition") that is the subject of this proceeding on March 11, 2005. The Petition identified the same 107 unresolved issues (excluding subparts) that had been included in the Initial Petition, as well as certain Supplemental Issues (Items 108-114). The Supplemental Issues addressed *USTA II*[6] and the *Interim Rules Order* issued by the Federal Communications Commission ("FCC") in WC Docket No. 04-313, CC Docket No. 01-338. BellSouth filed its Answer to the Petition on April 5, 2005.

---

3 *See generally* Docket No. 2004-42-C.

4 *Id.*

5 Order No. 2004-472 in Docket No. 2004-42-C. The Order explains that the withdrawal would "allow the parties to incorporate the negotiation of those issues precipitated by *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)("*USTA II*"), as well as to continue to negotiate previously identified issues . . . ."

6 *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

The Evidentiary Hearing in this matter was held on June 1, 2005, and June 13, 2006. BellSouth submitted the pre-filed testimony of Kathy Blake, Scot Ferguson, and Eric Fogle. The Joint Petitioners submitted the pre-filed testimony of Hamilton Russell/Susan Berlin,[7] James Falvey, Marva Johnson, John Fury, Robert Collins, and Jerry Willis.

BellSouth respectfully submits this Post-Hearing Brief, along with a companion Proposed Order, in accordance with the Commission's directive at the close of the June 13, 2006 Hearing. As a result of various rulings in this docket[8] and continued negotiations by the Parties, only 13 issues remain for the Commission to resolve.

III. LEGAL STANDARDS UNDER THE 1996 ACT

Sections 251 and 252 of the 1996 Act encourage negotiations between Parties to reach local interconnection agreements. Section 252(a) of the 1996 Act requires incumbent local exchange carriers ("ILECs") to negotiate the particular terms and conditions of agreements to fulfill the duties described in Sections 251(b) and 251(c)(2)-(6). As part of the negotiation

---

[7] On June 13, 2006, the Commission allowed NuVox witness Susan Berlin to adopt the pre-filed Rebuttal testimony and the hearing room testimony that was originally presented by Hamilton Russell and that was the subject of various pleadings and oral arguments.

[8] On March 11, 2005, the FCC's Final Unbundling Rules in FCC 04-290, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005) ("*TRRO*") became effective. No issues in this arbitration substantively address the *TRRO* because that decision was not effective until March 2005 – after the time period for identifying issues to be arbitrated in this proceeding closed. Nevertheless, Issues 23, 108, 111, 113 and 114 are similar if not identical to issues that were presented in the Commission's Generic Change of Law Proceeding (Docket No. 2004-316-C) relating to changes of law resulting from the *TRO* and the *TRRO*. Consequently, on May 31, 2005, the Hearing Officer granted the Parties' joint request to move these issues to the Generic Change of Law Proceeding for consideration and resolution. Similarly, because the *TRRO* also rendered moot several arbitration issues relating to the *Interim Rules Order*, the Hearing Officer also found on May 31, 2005 that Issues 109, 110, and 112 were moot and removed them from the arbitration. Finally, because they were similar, if not identical, to issues presented in the Generic Change of Law Docket (Docket No. 2004-316-C), the Commission removed Issues 26, 36-38, and 51 from this arbitration for consideration and resolution in that generic docket. (SC Tr. at 11-12). BellSouth will not address the merits of any of these issues in this Post-Hearing Brief.

process, the 1996 Act allows a party to petition a state Commission for arbitration of unresolved issues.[9] The petition must identify the issues resulting from the negotiations that are resolved, as well as those that are unresolved.[10] The petitioning party must submit along with its petition "all relevant documentation concerning: (i) the unresolved issues; (ii) the position of each of the parties with respect to those issues; and (iii) any other issues discussed and resolved by the parties."[11] A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the Commission receives the petition.[12]

The 1996 Act limits a state commission's consideration of any petition (and any response thereto) to the unresolved issues set forth in the petition and in the response.[13] Further, an ILEC can only be required to arbitrate and negotiate issues related to Section 251 of the 1996 Act, and the Commission can only arbitrate non-251 issues to the extent they are required for implementation of the interconnection agreement.[14] Issues or topics not specifically related to these areas are outside the scope of an arbitration proceeding, and the Commission's role is to resolve the parties' open issue to "meet the requirements of Section 251, including the regulations prescribed by the [FCC]."[15]

---

9 47 U.S.C. § 252(b)(2)

10 *See generally,* 47 U.S.C. §§ 252 (b)(2)(A) and 252 (b)(4).

11 47 U.S.C. § 252(b)(2).

12 47 U.S.C. § 252(b)(3).

13 47 U.S.C. § 252(b)(4).

14 *Coserv Limited Liab. Corp. v. Southwestern Bell Tel.,* 350 F.3d 482, 487 (5th Cir. 2003); *MCI Telecom., Corp. v. BellSouth Telecom., Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002).

15 47 U.S.C. § 251(c)(1).

IV. DISCUSSION OF INDIVIDUAL ISSUES[16]

Issue 2: How should "End User" be defined? (Agreement GT&C, Section 1.7)

The parties have settled this issue and thus it is no longer the subject of the arbitration proceeding.

Issue 4: What should be the limitation of each Party's liability in circumstances other than gross negligence or willful misconduct? (Agreement GT&C, Section 10.4.1)

With this Issue, the Joint Petitioners are attempting to change the standard in the telecommunications industry regarding limitation of liability by: (1) obtaining greater rights against BellSouth than what BellSouth provides to its own retail customers and greater rights than even the Joint Petitioners provide to their own retail customers; and (2) proposing one-sided language that results, at the end of the agreement's three-year term, in BellSouth's liability to NuVox being "capped" at more than $8 million while NuVox's liability to BellSouth would be capped at a mere $2,700. Specifically, with convoluted and confusing language,[17] the Joint Petitioners seek to have each Party's liability limited to 7.5 percent of amounts paid or payable at the time the claim arose, subject to several caveats and conditions. Conversely, BellSouth's proposed language is quite simple and memorializes the standard in the industry as it limits each Party's liability for negligent acts to bill credits. The Commission should reject the Joint Petitioners' language and adopt BellSouth's for the following reasons.

A. The Joint Petitioners' Proposed Language is Inconsistent with State and Federal Court Decisions in South Carolina.

---

[16] To facilitate the Commission's review of BellSouth's positions, Exhibit A to this Brief is BellSouth's most recent language for each of the remaining issues in dispute.

[17] *See* Exhibit A to Joint Petitioners' Direct Testimony, CLEC Version of § 10.4.1 of GT&C portion of the interconnection agreement.

Both state and federal courts in South Carolina have ruled that sound public policy supports limiting a telephone company's liability for negligent acts that are related to regulated operations. The South Carolina Court of Appeals, for instance, has held that:

> Provisions limiting the liability of public utilities for negligence in providing service are based on legitimate considerations of public policy. Reasonable utility rates are in part dependent on such limitations.[18]

In rendering this decision, the Court relied on a prior decision of the United States District Court for the District of South Carolina which recognized that:

> There is nothing harsh or inequitable in upholding such a limitation of liability when it is thus considered that the rates as fixed by the Commission are established with the rule of limitation in mind. Reasonable rates are in part dependent upon such a rule.[19]

The same reasoning applies in the context of this arbitration proceeding.

The 1996 Act requires BellSouth to negotiate interconnection agreements with the Joint Petitioners in good faith.[20] Moreover, if the parties do not mutually agree to different rates,[21] the 1996 Act obligates BellSouth to charge the Joint Petitioners cost-based rates for certain interconnection and for network elements that remain subject to the Act's unbundling obligations.[22] The cost-based rates the Commission approved for BellSouth's interconnection or unbundled network elements ("UNEs") in South Carolina do not take into account any costs BellSouth would incur if it suddenly lost its limitation of liability for negligent acts.[23] Were these rates to be adjusted to include such costs, they clearly would be higher than the rates that exist today, and competitive local exchange carriers ("CLECs") like the Joint Petitioners would

---

18 *Parnell v. Farmers Telephone Coop.*, 344 S.E.2d 883, 886 (S.C. Ct. App. 1986).
19 *See Pilot Industries v. Southern Bell*, 495 F.Supp. 356, 361 (D.S.C. 1979).
20 *See*, e.g., 47 U.S.C. §251(c).
21 See 47 U.S.C. §252(a)(1).
22 *See* 47 U.S.C. §252(d)(1)(A).
23 FL Tr. at 805-806; *see* Blake Direct Testimony at 22 (SC Tr. at 225).

have to pay more for interconnection and for UNEs than they pay today. BellSouth's proposed language, therefore, allows CLECs to pay BellSouth lower rates for certain interconnection and for UNEs than they would pay if BellSouth's liability were not limited in the manner proposed by BellSouth.

The Iowa Utilities Board recognized this exact issue in rejecting AT&T's request to increase an ILEC's limitation of liability language beyond what the ILEC provided to its retail customers.

> AT&T's proposal for SGAT section 5.8.1 would increase Qwest's liability to amounts that are greater than what Qwest charges for wholesale service. One problem with the proposal is that it seems to ignore that a provider's rates must cover its costs of service. Presumably, Qwest's retail and wholesale rates only include amounts necessary to reimburse customers for the actual loss of service (i.e., what the customer would have paid Quest for the service not received). AT&T believes that Qwest should have greater liability when providing wholesale service, but the record does not indicate that AT&T is willing to pay higher wholesale rates to obtain it.[24]

Similarly, in this proceeding, the Joint Petitioners have not offered to pay any increased rates that may result from the adoption of their proposed language. The Commission, therefore, should reject the Joint Petitioners' proposed language.

B. The Joint Petitioners' Language is Inconsistent with Several Agency Rulings.

The Joint Petitioners' language is inconsistent with the standard the FCC's Wireline Competition Bureau established regarding the scope of an ILEC's liability to a CLEC. The Bureau determined that an ILEC should treat a CLEC in the same manner that it treats its retail customers: "Specifically, we find that, in determining the scope of Verizon's liability, it is

---

[24] *See In re: US West Communications, Inc.*, Docket No. INU-00-2, 2002 WL 595093 at * 13 (Mar. 12, 2002)

appropriate for Verizon to treat WorldCom in the same manner as it treats its own customers."[25] The Joint Petitioners' proposed language also is inconsistent with decisions of the Florida Commission, the Georgia Commission, the Kentucky Commission, the North Carolina Commission, and an Arbitration Panel appointed by the Mississippi Commission, each of which rejected the Joint Petitioners' proposed language on this issue and, consistent with the *Virginia Arbitration Order*, adopted bill credits as the governing standard.[26] Similarly, state

---

[25] *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(E)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission*, CC Docket No. 00-218, 17 FCC Rcd. 27,039 (Jul. 17, 2002) ("*Virginia Arbitration Order*") at ¶ 709.

[26] *See* Florida Commission's *Final Order Regarding Petition for Arbitration,* Order No. PSC-05-0975-FOF-TP, Docket No. 040130-TP at 8 (Oct. 11, 2005) ("*Florida Order*") ("Further, we find that BellSouth shall treat the Joint Petitioners in the same manner BellSouth treats its own retail customers. It is undisputed that BellSouth's liability to its own retail customers is limited to the issuance of bill credits; therefore, it is appropriate for BellSouth's liability to Joint Petitioners to be similarly limited."); *Recommendation of the Arbitration Panel of the Mississippi Public Service Commission*, Docket No. 2004-AD-094 at 11 (Dec. 13, 2005) ("*Mississippi Order*") (concluding that "a party's liability should be limited to the issuance of bill credits in all circumstances other than gross negligence of willful misconduct."); Georgia Commission's *Order on Unresolved Issues* in Docket No. 18409-U (July 6, 2006)("*Georgia Order"*) at 3-4 (adopting Staff's recommendation "that the parties' liability for negligence be limited to bill credits); Kentucky Commission, *Order*, Case No. 2004-00044 at 3 (Sept. 26, 2005) ("*Kentucky Order"*) (finding that "BellSouth's proposal is reasonable" and that the "Joint Petitioners can provide no rationale for why 7.5 percent of amounts paid is reasonable."), *Joint Petitioners' motion for reconsideration denied by* Kentucky Commission (March 14, 2006) ("*Kentucky Recon Order*"); *Recommended Order*, NCUC Docket No. P-772, Sub 8, *et al*, at 11 (Jul. 26, 2005) ("*North Carolina Order"*) ("The Commission finds that BellSouth's language is more appropriate. The FCC's *Virginia Arbitration Order* (July 17, 2002) reviewed a similar issue in an arbitration between Verizon Virginia, Inc. (Verizon) and WorldCom. There, the FCC concluded that it was appropriate for Verizon to treat WorldCom in the same manner as it treats its own customers."), *Order Ruling on Objections and Requiring the Filing of the Composite Agreement* (February 8, 2006) at 6 ("*North Carolina Recon* Order") (denying Joint Petitioners' motion for reconsideration on Issue 4) These Orders are collectively attached hereto as **Exhibit B**. Additionally, on April 17, 2006, the Tennessee Regulatory Authority ("Authority") deliberated and voted on the remaining unresolved issues in the companion case pending before the Authority. Because the Authority has not yet issued a written order, BellSouth will not refer the Authority's decisions in this Post-Hearing Brief.

Commissions in Ohio and Kansas have rendered decisions that are contrary to the language proposed by the Joint Petitioners and consistent with the language proposed by BellSouth.[27]

C. The Joint Petitioners' Language is Inconsistent with Industry Practice

BellSouth's proposed language, which limits each Party's liability for negligence to bill credits, is exactly the standard that applies to BellSouth's retail customers. It also is the same standard that has governed the relationship between BellSouth and the Joint Petitioners for the last eight years.[28] Moreover, the Joint Petitioners acknowledge that limiting liability to the provision of bill credits is "probably the current practice" in the industry.[29]

In contrast, the 7.5 percent language proposed by the Joint Petitioners is not standard in the industry. The Joint Petitioners are aware of no interconnection agreement that contains language that is identical or similar to what they propose here.[30] To the contrary, the Joint Petitioners' current interconnection agreements limit each Party's liability to bill credits.[31]

---

[27] *See Sprint Communications, LP*, Case No. 96-1021-TP-ARB (Ohio P.U.C. Dec. 27, 1996), 1996 WL 773809 at *31 ("The panel does not believe that GTE's proposal to limit its liability to Sprint to the same degree it limits its liability to its own retail customers is unreasonable... In accordance with the Commission's award in 96-832, it is appropriate for GTE to limit its liability in the same manner in which it limits its liability to its customers."); *In the Matter of the Petition of the CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P.,* Docket No. 05-BTKT-365-ARB, Kansas Corporation Commission at 102 (Feb. 16, 2005) (refusing to adopt the Joint Petitioners' and CLEC proposal for limitation of liability language that exceeded bill credits).

[28] FL Tr. at 182; 943; FL Exhibit 14 at § A2.5.1; BellSouth's GSST at A2.5.1, attached as KKB-2 to Blake's Rebuttal Testimony.

[29] *See* Russell Depo. at 82-83; *see also* FL Tr. at 182. Reference to "Russell Depo" and similar references to the other Joint Petitioner depositions means the depositions taken by the parties as part of the North Carolina proceeding and which have been entered into the record here. When referring to depositions taken by the Florida Staff, which are part of this record, the cite will read "Russell FL Staff Depo."

[30] *See* Joint Petitioners Supplemental Response to Request for Production No. 6; Russell Depo. at 43.

[31] (SC Tr. at 393).

Additionally, none of the Joint Petitioners have the type of limitation of liability language they are proposing in their tariffs or standard retail contracts with South Carolina customers.[32] Instead, like BellSouth, the Joint Petitioners limit their liability to bill credits.[33] Additionally, KMC and NuVox have even more limited liability to their South Carolina retail customers than BellSouth is proposing here, as they limit their liability even for claims resulting from their own gross negligence.[34] Accordingly, the Joint Petitioners are requesting greater limitation of liability rights against BellSouth than what BellSouth provides for its own retail customers and what the Joint Petitioners are willing to provide to their retail customers. The Commission should reject this request.

In other proceedings, the Joint Petitioners have relied on an alleged Xspedius template contract[35] and on a provision in the NewSouth/AllTel South Carolina Interconnection Agreement to suggest that their language somehow does not depart from industry standards. Any such reliance is misplaced. The alleged Xspedius template contract, for instance, actually supports BellSouth's proposed language as it limits Xspedius' liability to ***bill credits*** for tariffed services. In particular, it provides that (1) the terms and conditions contained in the contract "supplement" the terms and conditions in Xspedius' tariffs[36]; (2) "[i]n the event of any conflict among the Agreement and its Addenda, Attachments, Service Order Forms, or the terms or rates of Xspedius' tariffs, *the terms and rates of the tariff shall control* if the service itself is

---

32 (FL Tr. 182, 184; KMC SC Tariff at § 2.1.4 (A); NuVox SC Tariff at § 2.1.4(B)(C); Xspedius SC Tariff at § 2.1.4(A)(H), collectively attached to Blake's SC Direct Testimony as KKB-1 (revised 5/23/05).

33 *Id.*

34 *See* Johnson Depo. at 62; KMC SC Tariff at § 2.1.4(H); NuVox SC Tariff at § 2.1.4(B).

35 Joint Petitioners produced the Xspedius template contract (XSP 000004-000005) in their December 7, 2004, supplemental response to BellSouth's Request for Production No. 16.

36 XSP 000004, Preamble.

tariffed";[37] (3) Xspedius' liability for the interruption of tariffed service is limited to bill credits;[38] and (4) the "[c]ustomer's exclusive remedies under this Agreement shall be (i) the termination of rights in section 6, and (ii) any credits for outages specifically set forth in the Agreement."[39] Thus, Xspedius' liability for the provision of tariffed services in the contract is limited to bill credits, which is the same standard in Xspedius' tariff, the same standard employed by BellSouth with its retail end users, and the same standard offered by BellSouth to resolve this issue. Consequently, the terms of this document support the language proposed by BellSouth, not the language proposed by the Joint Petitioners.[40]

The Commission should also reject the Joint Petitioners' argument that the NewSouth/AllTel South Carolina Interconnection Agreement excerpt[41] proves that a bill credit is not the standard in the industry. AllTel is a rural ILEC that does not yet have a Section 251(c) obligation, like BellSouth, to provide UNEs at cost-based rates.[42] Indeed, there is no UNE section in the "Table of Contents" in the Alltel agreement. Thus, unlike BellSouth, AllTel is not restricted to cost-based TELRIC prices and, therefore, can charge NewSouth (or NuVox) rates to

---

37 XSP 000004, Preamble (emphasis added).

38 XSP 000004, § 6.

39 XSP 000004 at § 15. It should be noted that Section 6 of the Xspedius contract does not address termination rights. Rather, this section refers to credits for interruption of tariffed services.

40 While the contract in question does provide for alternative limitation of liability language in some regards for non-tariffed services, it is not clear when this language applies, if at all, given the express wording of the contract. Nevertheless, as stated above, it is clear that Xspedius' liability for the provision of tariffed services in the contract is limited to bill credits.

41 *See* Exhibit B to Joint Petitioners SC Direct Testimony.

42 The obligations of Section 251(c) "shall not apply to a rural telephone company [like Alltel] until" a state commission determines that certain conditions have been met. 47 U.S.C. §251(f)(1).

allow it to recover the additional expenses that may be experienced by failing to limit liability to bill credits.[43]

And, unlike the AllTel agreement that limits each party's liability to certain amounts, the Joint Petitioners' proposal results in a totally one-sided limitation of liability provision that blatantly favors the Joint Petitioners. Based on the current billings between BellSouth and NuVox, for instance, at the end of the agreement's three-year term, BellSouth's liability to NuVox would be "capped" at *$8,100,000* while NuVox's liability to BellSouth would be limited to a mere *$2,700.*[44] Thus, if a NuVox employee negligently caused over $8 million worth of damages to a BellSouth central office after month 36 of the agreement, NuVox's maximum liability to BellSouth would be $2,700. On the other hand, if BellSouth performed the same act and caused the same damages to NuVox, NuVox would be able to recover all of its damages.[45] These illustrations accurately describe the ramifications of adopting the Joint Petitioners' language based on the actual billings of the parties, as conceded by the Joint Petitioners.[46]

D. The Joint Petitioners' Language is Unnecessary

The Joint Petitioners' tariffs and standard retail contracts limit their exposure to bill credits and also insulate them from any liability for damages that result from the actions of

---

43 (FL Tr. 932-33)

44 (FL Tr. at 180; SC Tr. at 400-401).

45 (SC Tr. at 401-402).

46 In other proceedings, the Joint Petitioners have argued that Ms. Blake's testimony in Georgia proves that BellSouth alters its standard limitation of liability language in customer contracts. This argument is without merit. Ms. Blake testified that BellSouth's standard is bill credits, that BellSouth is seeking to obtain this standard in the interconnection agreement, and that she ***did not know*** about the specifics for every single customer contract and whether BellSouth deviated from its standard. (GA Tr. at 999-1000). Further, as previously stated, the Joint Petitioners have no proof to support their claim that BellSouth deviates from its tariff language regarding limitation of liability in customer service agreements ("CSAs"). Indeed, Ms. Blake testified that while she was not aware of any specific CSAs that deviated from BellSouth's tariff language, BellSouth's CSAs differ predominantly in price only. (FL Tr. 947).

service providers, including BellSouth.[47] Thus, BellSouth's language would compensate the Joint Petitioners for any loss that may result from BellSouth's negligence. The Joint Petitioners, however, want more; they want the ability to recover 7.5 percent of amounts paid or payable on the day the claim arose, regardless of the extent or scope of their damage, and *in addition to* any bill credits that they may receive.[48] Consequently, adopting the Joint Petitioners' language could result in the Joint Petitioners making claims for damages against BellSouth that exceed the scope of the ultimate damage purportedly sustained.[49]

E. An Interconnection Agreement Is Not A Commercial Contract, And It Should Not Be Treated As Such.

The Joint Petitioners' claim that their proposed language is typically found in commercial contracts.[50] Even assuming that were accurate, it is of no import. This proceeding is not about a commercial contract – it is about an interconnection agreement negotiated and arbitrated pursuant to Section 252 of the 1996 Act. A true commercial contract would not (1) require the Commission to resolve language the parties could not agree on; (2) require, as a matter of law, that one party enter into the contract; (3) require, as a matter of law, that the providing party charge a certain cost-based rate for the services provided; and (4) be subject to adoption by all other customers. Thus, as the Fourth Circuit has explained, "[w]hen the parties

---

47 *See* NuVox SC Tariff at § 2.1.4(H); KMC SC Tariff at § 2.1.4(C); Xspedius SC Tariff at § 2.1.4(C), attached as KKB-1 to Blake's SC Direct Testimony; Russell Depo at 145-146.

48 *See* Joint Petitioner Exhibit "A" at GT&C § 10.4.1 ("provided that the foregoing provisions shall not be deemed or construed ... or (B) limiting either Party's right to recover appropriate refund(s) of or rebate(s) or credit(s) for fees, charges, or other amounts paid at Agreement rates ....").

49 Additionally, the Joint Petitioners' proposal fails to take into account that they receive payments under the Commission approved Self Effectuating Enforcement Mechanism ("SEEM") plan in the form of penalties from BellSouth for the very actions that may give rise to a claim of negligence against BellSouth. *See* Blake Direct Testimony at 18-19 (SC Tr. at 230-231).

50 FL Tr. at 188.

are . . . negotiating, many of their disputes will have been previously resolved by among other things, FCC Rules and interpretations, prior state commission rulings and interpretations, and agreements reached with other CLECs – all of which are a matter of public record. . . . In this light, many so-called 'negotiated' provisions [in interconnection agreements] represent nothing more than an attempt to comply with the requirements of the 1996 Act."[51]

Based on this very reasoning, the North Carolina Commission has already found, in a dispute between BellSouth and a Joint Petitioner, that interconnection agreements are "not to be treated as typical commercial contracts."[52] Later, the United States District Court for the Southern District of Mississippi reached the same conclusion in its recent decision overturning the Mississippi Public Service Commission's interpretation of the *TRRO* relating to "no new adds".[53] As this Federal District Court found:

> If the FCC's Order is viewed not merely as a general regulation which bears on the proper interpretation of the interconnection agreements but as an outright abrogation of provisions of parties' interconnection agreements, consideration of its jurisdiction to act in the premises must take into account that interconnection agreements are "not ... ordinary private contract[s]," and are "not to be construed as ... traditional contract[s] but as ... instrument[s] arising within the context of ongoing federal and state regulation."[54]

---

[51] *AT&T Communications of the Southern States, Inc. v. BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000).

[52] See In the Matter of BellSouth Telecommunications, Inc. v. NewSouth Communications, Corp., Docket No. P-772, Sub at 6 (Jan. 20, 2005) ("NewSouth Reconsideration Order").

[53] *See BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Comm'n, et al.*, Civil Action No. 3:05CV173LN at 13 (Apr. 13, 2005).

[54] *Id.* (quoting *E.spire Communications, Inc. v. N.M. Pub. Regulation Comm'n*, 392 F.3d 1204, 1207 (10th Cir. 2004)(citing *Verizon Md., Inc. v. Global Naps, Inc.*, 377 F.3d 355, 364 (4th Cir. 2004) ("interconnection agreements are a 'creation of federal law' and are 'the vehicles chosen by Congress to implement the duties imposed in § 251.'"); s*ee also, BellSouth Telecommunications, Inc. v. Cinergy Communications Co., et al.*, Civil Action No. 3:05-CV-16-JMH at 12, n.3 (E.D. Ky. Apr. 22, 2005) ("the Court is likely to find that due to the fact that the interconnection agreements are not privately negotiated contracts, the Mobile-Sierra doctrine is not applicable.") (citations omitted).

Although the Joint Petitioners acknowledge these rulings, they continue to erroneously assert that interconnection agreements are "commercial agreements" and that the terms and conditions that they believe are found in typical commercial agreements should be incorporated into this 252 agreement.[55] The Commission should reject these erroneous arguments.

F. The Joint Petitioners' Language is Unworkable.

Although the Joint Petitioners now claim that they all have the same position on the issues,[56] they originally did not. In fact, in their depositions, the Joint Petitioners each had different interpretations of what two key provisions in their proposal ("paid or payable" and "on the day the claim arose") mean. This fact alone proves that their proposed language is unworkable and subject to abuse.

G. The Joint Petitioners' Reliance on Their Off-Tariff Contracts is Unavailing.

The Commission should reject the Joint Petitioners' argument that they often deviate from the standard limitation of liability language in their end user contracts. In discovery, the Joint Petitioners could not identify a single, specific instance where they had to concede limitation of liability language in order to attract a customer.[57] Additionally, in their depositions,

---

55 FL Tr. at 190.

56 FL Tr. at 170.

57 *See* Joint Petitioners Response to Interrogatory No. 22. The Joint Petitioners provided this response subject to several objections. The Joint Petitioners claim that BellSouth is at fault for not filing a motion to compel better responses should be given little credence. Regardless of what they now claim or the reason for providing the discovery response provided, the Joint Petitioners responded to BellSouth's discovery by stating that they had no specific knowledge to support their allegations as to deviations from their tariff language in end user contracts. BellSouth relied on their response and considered it to be accurate and truthful. If it was not, the Joint Petitioners should have corrected it or provided responsive information.

each of the Joint Petitioners stated that they were not aware of a specific instance where an end user contract deviated from standard limitation of liability language.[58]

Similarly, the Commission should discount any attempt by the Joint Petitioners to rely on Mr. Russell's testimony in Georgia that 99 percent of NuVox's customers purchase services out of customer service agreements and not tariffs. Even if that is so, it clearly does not mean that NuVox alters its tariffed limitation of liability provision in all of these contracts. In fact, Mr. Russell testified in his deposition that NuVox's contracts incorporate by reference NuVox's tariffs. He also testified that NuVox alters its limitation of liability language in its contracts "once in a while" and that he did not know how frequently these changes occurred.[59] No evidence of record, therefore, suggests that the Joint Petitioners routinely alter limitation of liability language in end user contracts.

In any event, whether or not the Joint Petitioners deviate from the standard limitation of liability language in negotiating with their retail customers – a fact they have failed to prove – is irrelevant in determining the limitation of liability between the Joint Petitioners and BellSouth. This is because the when they negotiate retail services with their end user customers, the Joint Petitioners have options that are not available to BellSouth when it negotiates an interconnection

---

[58] *See* Joint Petitioners Response to Interrogatory No. 22 (attached as Exhibit KKB-4 to Blake's Rebuttal Testimony). Regarding the identification of any particular customer, Mr. Falvey even attempted to minimize his lack of knowledge for this specific factual question by stating that there was much he did not know about Xspedius.

> Q. Do you know if your contracts with your customers allow for the deviation of your standard limitation of liability language in your tariffs?
>
> A. I'm not aware of that ever. I'm not aware of any case where someone's asked for a deviation. There's a lot that I'm not aware of.

(Falvey Depo. at 33).

[59] *See* Russell Depo. at 28-29; 84-85.

agreement for wholesale services with CLECs like the Joint Petitioners. The Joint Petitioners, for example, can make the business decision to "walk away from the negotiating table" rather than agree to alter their standard limitation of liability language with an end user. They can also seek to recover any increased liabilities that may be associated with deviating from their standard language by charging negotiated rather than TELRIC rates.

In sharp contrast, BellSouth does not have these options when it negotiates an interconnection agreement with CLECs under the 1996 Act. BellSouth cannot refuse to enter into an interconnection agreement with the Joint Petitioners and must charge TELRIC rates for interconnection and UNEs that it is required to provide under such agreements. Further, whenever Joint Petitioners do make the business decision to deviate from their standard limitation of liability language after assessing the risk of a particular customer, the Joint Petitioners do not have to consider the prospect that every other potential customer in South Carolina could be entitled to those same terms and conditions as a matter of law. Thus, even if true, the Joint Petitioners' argument is irrelevant for the purposes of this arbitration and only highlights the fact that the standard limitation of liability language in the industry should govern.

On a related note, the Joint Petitioners have argued in other proceedings that their proposed language is consistent with the standard articulated in the *Virginia Arbitration Order* because BellSouth allegedly deviates from its tariff limitation of liability language in its Contract Service Agreements ("CSAs"). The Commission should reject any such argument the Joint Petitioners may present in this proceeding. In addressing this issue, the *Virginia Arbitration Order* was specifically referring to bill credits. For instance, in paragraph 708, the FCC stated the following in summarizing Verizon's arguments against the adoption of a non-standard limitation of liability provision: (1) "each party's liability under the interconnection agreement

should generally be limited to the value of the services provided to the other party that are the subject of the claim;" and (2) "Verizon's liability to its own end user customers for less than perfect service is generally limited to the amount of the charge for which Verizon billed, and the same should be true for WorldCom as a customer of Verizon."[60] BellSouth is asking that this same standard apply here. That is, BellSouth's liability to the Joint Petitioners should be the same standard that generally applies to its retail customers – bill credits.

Additionally, the Joint Petitioners have no proof to support their claim that BellSouth deviates from its tariff language regarding limitation of liability in CSAs. Indeed, although she was not aware of any specific CSAs that deviated from BellSouth's tariff language, BellSouth witness Blake did testify that CSAs differ predominantly in price only. (FL Tr. 947).

Issue 5: BellSouth Issue Statement: If the CLEC does not have in its contracts with end users and/or tariffs standard industry limitations of liability, who should bear the resulting risks? Joint Petitioners' Issue Statement: To the extent that a Party does not or is unable to include specific limitation of liability terms in all of its tariffs and End User contracts (past, present and future), should it be obligated to indemnify the other Party for liabilities not limited? (GT&C, Section 10.4.2)

If a CLEC end user brings a claim against BellSouth for a matter related to the interconnection agreement, BellSouth should be in the same position that it would be in if the CLEC end user was a BellSouth end user. BellSouth should not suffer financial hardship as a result of a business decision or action by the Joint Petitioners. Accordingly, to the extent the Joint Petitioners decide to not limit their liability in accordance with industry standards, the Joint Petitioners should indemnify or reimburse BellSouth for any loss BellSouth sustains as a result of that decision or action.

The Florida Commission, the Georgia Commission, the Kentucky Commission, the North Carolina Commission, and the Mississippi Arbitration Panel have all agreed with

---

60 *Virginia Arbitration Order* at ¶ 708.

BellSouth's position on this issue and have all rejected the Joint Petitioners' position on this issue.[61] As these commissions correctly found, the Joint Petitioners' objection to BellSouth's language is unsubstantiated. After all, the exact language BellSouth proposes for this issue is in the Joint Petitioners' current interconnection agreements and has never been the subject of any dispute.[62] Further, the Joint Petitioners currently have limitation of liability language in their tariffs and contracts; they believe that their language is the maximum limit allowed by law; they have no plans to remove this language; their tariffs are in effect today; and they intend to enforce tariff provisions limiting their liability.[63] In fact, as conceded by NuVox witness Russell, having unlimited liability is not a prudent business move.[64]

Nevertheless, the Joint Petitioners object to BellSouth's language on the premise that the Parties cannot limit the rights of third Parties via the parties' interconnection agreement. While that may be correct, it is a red herring that has no application here. BellSouth's language does

---

61 *See Florida Order* at 10 (". . . CLECs have the ability to limit their liability through their customer agreements and/or tariffs. If a CLEC does not limit its liability through its customer agreements and/or tariffs, then the CLEC should bear the resulting risk."); *Mississippi Order* at 15 (same); *Georgia Order* at 5 (adopting Staff recommendation to "order that should Joint Petitioners not limit their liability in accordance with BellSouth tariffs that the Joint Petitioners should indemnify BellSouth for any loss BellSouth sustains because of that decision" and noting that "[i]t would not be fair for BellSouth to be put at an increased risk as a result of a CLEC's business decision to offer an end user customer a more favorable limitation of liability provision in their service agreement"); *Kentucky Order* at 4 ("Joint Petitioners should use the industry standard limitation of liability in their relationship with their end-users to limit the exposure to which BellSouth would be subject in the absence of such industry standard language."). *North Carolina Order* at 13 ("There is no evidence the proposed language has caused a dispute or adversely affected a third party or that the CLPs have in fact relaxed their limitation of liability language. . . The Commission concludes that if a party elects not to place standard industry limitations of liability in its contracts with end users or in its tariffs, that party shall indemnify the other party for any loss resulting from this decision.").

62 SC Tr. at 417; FL Tr. at 204-205.

63 SC Tr. at 417-418; FL Tr. at 203; Russell Depo. at 87; Falvey Depo. at 61; Johnson Depo. at 81-82; NuVox SC Tariff at § 2.1.4; KMC SC Tariff at § 2.1.4; 2.1.6; Xspedius SC Tariff at § 2.1.4; 2.1.6, collectively attached as KKB-1 to Blake's SC Direct Testimony).

64 *See* Russell Depo. at 82.

not limit the rights of any third party or dictate the terms by which the Joint Petitioners can offer service to their customers. Rather, BellSouth's language – language that has governed the Parties' relationship for the last several years – imposes obligations upon the Joint Petitioners (not their customers) in the event the Joint Petitioner make a business decision to not limit their liability within industry standards.

BellSouth's need for this level of protection is pronounced in light of the Joint Petitioners' position regarding indemnification. Specifically, under the Joint Petitioners' indemnification proposal (discussed in detail *infra*), BellSouth could only obtain indemnification from the Joint Petitioners if one of their end users sued BellSouth for "libel, slander or invasion of privacy arising from the content of the receiving Party's own communications."[65] In contrast, BellSouth would have to indemnify the Joint Petitioners for any "violation of Applicable Law" or injuries or damages arising out of BellSouth's negligence, gross negligence, or willful misconduct. *Id.*

This problem is further compounded by the fact that the Joint Petitioners' end users are not purchasing services out of BellSouth's tariffs and are not under contract with BellSouth.[66] Accordingly, if the Joint Petitioners agree to pay a customer $1,000 if they fail to provision a loop within a specific time period, and if BellSouth misses the due date for the loop, the Joint Petitioners could seek to recover the $1,000 they agreed to pay their customer from BellSouth through the indemnification language.[67] If that customer were a BellSouth customer, however, BellSouth's total exposure would be for bill credits. BellSouth should not be exposed to greater

---

65 *See* Joint Petitioner Exhibit "A" at GT&C § 10.5.

66 FL Tr. at 205.

67 FL Tr. at 808. While the Joint Petitioners may argue that this service guarantee hypothetical is not relevant, Mr. Russell testified in his deposition that NuVox currently offers service guarantees to its customers. (Russell Depo. at 78-81).

liability than otherwise contemplated simply because the end user is a CLEC end user rather than a BellSouth end user.

The Minnesota Public Utilities Commission addressed this exact scenario in rejecting similar indemnification language proposed by AT&T in an arbitration with Qwest:

> Generally, the Commission regards indemnity clauses as means for allocating foreseen risks, not as means to induce parties to insure one another against unanticipated and unbounded possibilities. Quest expressed concern that AT&T could advertise that it would not limit liability for consequential damage for service interruptions, knowing that Qwest would make AT&T whole if a claim ever arose. Whether or not this is a likely scenario, the indemnity language should not be drafted in a fashion to enable such a result.[68]

This Commission should adopt BellSouth's proposed language to avoid similar undesirable results here. BellSouth's language is reasonable and insures that BellSouth's ultimate exposure to a CLEC end user is the same as it would be for a BellSouth end user.[69]

Issue 6: BellSouth Issue Statement: How should indirect, incidental or consequential damages be defined for purposes of the Agreement? Joint Petitioners' Issue Statement: Should the Agreement expressly state that liability for claims or suits for damages incurred by CLEC's (or BellSouth's) customers/End Users resulting directly and in a reasonably foreseeable manner from BellSouth's (or CLEC's) performance of obligations set forth in the Agreement are not indirect, incidental or consequential damages? (GT&C Section 10.4.4)

The Florida Commission, the Kentucky Commission, the North Carolina Commission,

---

[68] *In re: Petition of AT&T Communications of the Midwest, Inc.*, Minn. P.U.C., Docket No. P-442, 421/IC-03-759, 2003 WL 22870903 at *18 (Nov. 18, 2003) ("*Minnesota Arbitration Order*"); *see also*, *In re: AT&T Communications of New York, Inc.*, N.Y. P.S.C., Case 01-C-0095, 2001 WL 1572958 at 10 (finding that AT&T should implement tariff and contract provisions to limit Verizon's potential liability to AT&T customers).

[69] The Commission should also reject any claim by the Joint Petitioners that this is a competitive issue. The language in dispute has been in the Joint Petitioners' current South Carolina interconnection agreements, (SC Tr. at 417), and they have been competing with BellSouth during the term of those and previous agreements. Additionally, Mr. Russell's fear that, with this provision, BellSouth could deviate from its tariff language when bidding for a customer while the Joint Petitioners could not, is a pure hypothetical not based on any personal knowledge. (FL Tr. at 207).

and the Mississippi Arbitration Panel have rejected the Joint Petitioners' position on this issue.[70] The Georgia Commission adopted the Joint Petitioners proposed language, but only after modifying the language in order to address BellSouth's "legitimate complaint that the language proposed by the Joint Petitioners may allow them to circumvent other provisions in the agreement concerning limitation of liability."[71] In light of the obvious problems with the Joint Petitioners' proposed language, this Commission should reject the Joint Petitioners proposed language. In fact, there is no legitimate reason for the Joint Petitioners to be arbitrating this issue.

The Parties agree that they will not be liable to each other for indirect, consequential or incidental damages. However, with their confusing language, the Joint Petitioners are attempting to preserve certain damage claims their end users may have against BellSouth. Specifically, as testified by NuVox witness Russell, the purpose of the Joint Petitioners' language is to make sure that certain end user damage claims against BellSouth are not to be construed as incidental, consequential, or indirect damages.[72]

---

[70] *See Florida Order* at 11 (". . . we shall not define indirect, incidental or consequential damages for purposes of the Agreement. The decision of whether a particular type of damage is indirect, incidental or consequential shall be made, consistent with applicable law, if and when a specific damage claim is presented to this Commission, the FCC or a court of law."); *Mississippi Order* at 17 (same); *Kentucky Order* at 5 (". . . [t]he Commission finds that the language proposed by the Joint Petitioners is not necessary and should not be placed in the interconnection agreement. Interested persons who may be affected by the differing definitions proposed by the parties appear to have redress in courts of general jurisdiction."); *North Carolina Order* at 14-15 ("The Commission approves BellSouth's proposed version of Section 10.4.4 in the General Terms and Conditions of the Agreement. The Commission agrees that the language proposed by the Joint Petitioners is unnecessary and potentially confusing. The end users are not parties to this Agreement or arbitration and therefore their rights should be defined not by this Agreement, but rather pursuant to state contract law.").

[71] *Georgia Order* at 6-7. BellSouth has asked to Georgia Commission to clarify its ruling on Issue 6. A ruling on BellSouth's motion is pending.

[72] It is undisputed that neither Party will be liable to the other for incidental, indirect, or consequential damages. (FL Tr. at 207).

Q. So the purpose of your language is to make sure that nothing that NuVox and BellSouth says in this agreement restricts, impairs, or limits whatever rights and damage claims your end users may have; is that right?

A. That's correct. So that NuVox is not left holding the bag for BellSouth's negligence.[73]

The Joint Petitioners take this position even though they readily concede that (1) neither BellSouth nor the Joint Petitioners can affect the rights of third-party end users through this interconnection agreement; and (2) there is nothing in BellSouth's proposed language that seeks to limit either Party's liability to any end user.[74] On cross-examination, the futility of the Joint Petitioners' position was readily apparent:

Q. So let me make sure I understand your testimony, Mr. Russell. You agree with me that as a matter of law we can't impact the rights of third parties vis-à-vis this contract; correct?

A. I agree with you there. What we're trying to prevent is being left holding the bag for BellSouth's negligence based on some contractual language in this section.

Q. You also agree with me that there's nothing in BellSouth's language that says BellSouth is attempting to insulate itself from end user claims; is that correct?

A. I agree with that. However, the way the language is written, it could force the Joint Petitioners to be responsible for damages related to BellSouth's own negligence.

(FL Tr. at 209-210). Thus, the Joint Petitioners' position is of no force and effect as a matter of law and is based upon a concern that does not exist.

In addition to being legally indefensible, the Joint Petitioners' language is unnecessary and guts any limitation of liability protections ultimately ordered. NuVox witness Russell

---

73 (FL Tr. at 208).

74 (FL Tr. at 209-210; *see also*, Johnson Depo. at 5, 67, and 71).

testified that the purpose of their proposed language was to make certain that end user damages that arise directly and proximately from BellSouth's negligence, gross negligence or willful misconduct cannot be termed in this agreement as incidental or consequential.[75] The language proposed by the Joint Petitioners, however, does not address this nonexistent concern. It provides that no Party would be responsible for indirect, incidental, or consequential damages "provided that neither the foregoing nor any other provision of this Section 10 shall be deemed or construed as imposing any limitation on the liability of a Party for claims or suits for damages incurred by End Users of the other Party or by such other Party vis-à-vis its End Users to the extent such damages result directly and in a reasonably foreseeable manner from the first Party's performance of services hereunder ...."[76] Damages that are direct and foreseeable, however, cannot also be indirect, incidental or consequential. Thus, not only is the Joint Petitioners' language of no force and effect as a matter of law, it is also unnecessary.

Furthermore, notwithstanding the Parties' agreement that there should be some limitation of liability between them, the Joint Petitioners' language emasculates any such limitation by excluding the limitation of liability provision for damages "incurred by such other Party vis-à-vis its End Users." Thus, as long as the Joint Petitioners brought a claim for damages incurred by the Joint Petitioners "vis-à-vis its End Users" (whatever that means), BellSouth's liability to the Joint Petitioners could be unlimited. The Commission should not allow the Joint Petitioners to use legally unenforceable and unnecessary language to circumvent already agreed upon concepts. BellSouth's proposed language is legally enforceable, reasonable, and accurately sets forth the Parties' mutual agreement to not be liable to each other for indirect, consequential or incidental damages.

---

75 FL Tr. at 208; Russell Depo. at 102, 104-105.

76 *See* Joint Petitioner Exhibit "A" at GTC § 10.4.4.

Issue 7: What should the indemnification obligations of the parties be under this Agreement? (GT&C, Section 10.5)

The Joint Petitioners' language is one-side and inconsistent with industry standards. NuVox concedes that in most cases, the Joint Petitioners will be the receiving Party and BellSouth will be the providing Party under the interconnection agreement.[77] Thus, in most cases, the Joint Petitioner's language requires BellSouth to indemnify the Joint Petitioners for "(1) [BellSouth's] failure to abide by Applicable Law, or (2) injuries or damages arising out of or in connection with this Agreement to the extent caused by [BellSouth's] negligence, gross negligence or willful misconduct."[78] Conversely, under the Joint Petitioners' proposed language, the Joint Petitioners would only indemnify BellSouth "against any claim for libel, slander or invasion of privacy arising from the content of [the Joint Petitioners'] own communications." *Id.* Thus, BellSouth would have virtually unlimited indemnification obligations to the Joint Petitioners while the Joint Petitioners would have essentially no indemnification obligations to BellSouth.

In fact, if BellSouth were sued by a third party solely as the result of the negligence of a Joint Petitioner, BellSouth would have no indemnification rights against the Joint Petitioners.[79] The Joint Petitioners are aware of no other interconnection agreement that contains such draconian indemnification provisions.[80] Clearly, such a result is unacceptable, because as a provider of services to the Joint Petitioners, BellSouth should be indemnified by the Joint Petitioners for claims that their end users bring against BellSouth. The Joint Petitioners expect

---

77 FL Tr. at 199.

78 *See* Joint Petitioner Exhibit "A" GT&C at § 10.5.

79 FL Tr. at 202. Even in the situation where BellSouth is sued by a Joint Petitioner end user and BellSouth is not at fault, BellSouth still would incur substantial expenses in defending itself against the lawsuit. BellSouth, therefore, would still need to be indemnified by the Joint Petitioners

80 *See* Russell Depo. at 119.

as much when they are the party providing services to others -- NuVox's tariffs require its end users to indemnify NuVox for "any act or omission," and they do not require NuVox to indemnify its end users in any instance.[81]

In addition to being patently unfair and contrary to the obligations imposed on their end users, the Joint Petitioners' proposed language is inconsistent with the FCC's Wireline Competition Bureau's precedent on this issue. In the *Virginia Arbitration Order*, the Bureau rejected WorldCom's attempt to include similar, expansive indemnification language in an interconnection agreement with Verizon:

> Verizon has no duty to provide perfect service to its own customers; therefore, it is unreasonable to place that duty on Verizon to provide perfect service to WorldCom. In addition, we are not convinced that Verizon should indemnify WorldCom for all claims made by WorldCom's customers against WorldCom. Verizon has no contractual relationship with WorldCom's customers, and therefore lacks the ability to limit its liability in such instances, as it may with its own customers. As the carrier with the contractual relationship with its own customers, WorldCom is in the best position to limit its own liability against its customers in a manner that conforms with this provision.[82]

Similarly, in the *Minnesota Arbitration Order*, the Minnesota Commission rejected AT&T's attempts to make Qwest indemnify AT&T for "any breach of Applicable Law," finding that "indemnity clauses [are] means for allocating foreseen risks, not [] means to induce parties to insure one another against unanticipated and unbounded possibilities" and that AT&T's language "would make Parties potentially liable for another party's conduct far removed from the ICA."[83] The same rationale applies here as the Joint Petitioners' language is designed to obligate BellSouth to indemnify them for essentially any type of claim. This is especially true

---

81 *See* FL Tr. at 196; *see also*, NuVox SC Tariff at § 2.1.4.(L)(J); KMC SC Tariff at § 2.1.4, collectively attached as Exhibit KKB-1 to Blake's Direct Testimony.

82 *Virginia Arbitration Order* at ¶709.

83 2003 WL 22870903 at *18.

given the Joint Petitioners' position that "Applicable Law" includes the law in existence at the time of execution of the interconnection agreement, regardless of whether that law is memorialized in the agreement.[84] Thus, if the Commission adopted the Joint Petitioners' language, BellSouth could be obligated to indemnify the Joint Petitioners for alleged violations of some undisclosed law.[85]

Moreover, the expansive and almost unlimited indemnification obligations sought by the Joint Petitioners are ultimately unnecessary because each of them have provisions in their tariffs that preclude any liability for the actions of other service providers, like BellSouth.[86] Thus, the Joint Petitioners already insulate themselves from the very liability they seek to have covered through their indemnification language. Consequently, the Joint Petitioners' claim that BellSouth's language requires the Joint Petitioners to be BellSouth's insurance carrier is incorrect.

Additionally, the Joint Petitioners can cite to no past history or dealings between the Parties to support this substantial change in the industry standard. None of the Joint Petitioners are aware of any instance where they previously sought indemnification from BellSouth.[87] Further, as with Issue 4, the Joint Petitioners' reliance on what are purportedly common

---

84 FL Tr. at 200.

85 *(Id.)*. In other proceedings, the Joint Petitioners have argued that the Parties have agreed that the receiving party will indemnify the party providing service for damages caused by the receiving party's own unlawful conduct. The Commission should reject any such argument because the Joint Petitioners clearly have not agreed to provide BellSouth with such protections. As reflected by Joint Petitioner Exhibit A (attached to their Direct Testimony), the Joint Petitioners have only agreed to indemnify BellSouth for claims of libel, slander, or invasion of privacy arising from the content of the Joint Petitioners' own communication. (*See* JP Exhibit "A"). This limited right is the only indemnification right that the Joint Petitioners have agreed to provide BellSouth as the providing party.

86 *See* NuVox SC Tariff at § 2.1.4(H)(1); KMC SC Tariff at § 2.1.4(C); Xspedius SC Tariff at § 2.1.4.(C); Russell Depo at 145-147; Johnson Depo. at 51.

87 SC Tr. at 417; Russell Depo. at 154; Johnson Depo. at 50; Falvey Depo. at 92.

provisions in the commercial agreement context is misplaced. As previously stated and as found by the Fourth Circuit, the Federal District Court in Mississippi, and the North Carolina Commission, interconnection agreements are not typical commercial agreements and should not be construed or treated as such. And, irrespective of what may or may not be commercially reasonable, BellSouth's UNE rates were not established under the premise that BellSouth would have almost unlimited exposure via indemnification language in an interconnection agreement.

In other proceedings, the Joint Petitioners have attempted to rely on their own tariffs and template contracts to support their one-sided limitation of liability language. This Commission should reject any such attempts.[88] These tariffs and contracts show that the Joint Petitioners are refusing to give BellSouth the same rights they already have agreed to give their end users. For instance, and as stated above, none of the Joint Petitioners' tariffs or contracts impose upon the Joint Petitioners (as the providing party) the same indemnification obligations that they seek from BellSouth when it is the providing party under the interconnection agreement. Indeed, NuVox's tariffs require end users to indemnify it for "any act or omission" and do not require NuVox to indemnify the end user in any instance.[89]

Similarly, the NewSouth template contract produced by the Joint Petitioners in discovery[90] actually supports BellSouth's case because NewSouth agrees to take on indemnification obligations in the contract that exceed what the Joint Petitioners are willing to do here. Likewise, the Xspedius template contract also produced by the Joint Petitioners in

---

[88] While the Joint Petitioners have relied on their tariffs to support their arguments with Issue 7, they have asked other state Commissions to disregard their tariffs in deciding Issue 4.

[89] *See* FL Tr. at 196; *see also*, NuVox SC Tariff at §§ 2.1.4.(I), (J); KMC SC Tariff at §§ 2.1.4(E), (G).

[90] Joint Petitioners produced a NewSouth template contract (NSC/NVX 000079-000081) in their June 29, 2004, response to BellSouth's Request for Production No. 16. *See also* NVX 000051-52 which is another template contract produced by Joint Petitioners in discovery.

discovery requires the customer or party receiving service to indemnify Xspedius for any loss "that arises out of, or is directly or indirectly related to, ... any act or omission of Customer."[91] Xspedius, however, is not willing to provide BellSouth with these same protections. And, unlike BellSouth's proposed language, Xspedius provides no indemnification rights to the end user as its contract states that "Xspedius will not be liable for ... (6) claims against Customer by any other party."[92] Thus, the Joint Petitioners can find no solace in their own tariffs and contracts, proving once again that Joint Petitioners seek rights against BellSouth that they are not willing to provide to their own end users.

In contrast, BellSouth's proposed language for this issue is consistent with the standards in the industry (including the Joint Petitioners' tariffs) as it requires the receiving Party to indemnify the providing Party in two limited situations: (1) claims for libel, slander, or invasion of privacy arising from the content of the receiving Party's own communications; or (2) any claim, loss, or damaged claimed by the "End User or customer of the Party receiving services arising from such company's use or reliance on the providing Party's services, actions, duties or obligations arising out of this Agreement."[93] This language is considerably more narrow than the Joint Petitioners' proposal, which would require BellSouth to indemnify the Joint Petitioners for any claims, regardless of whether it was brought by an end user. Therefore, the Commission should adopt BellSouth's language on this issue

Issue 9: Should a court of law be included in the venues available for initial dispute resolution for disputes relating to the interpretation or implementation of the Interconnection Agreement? (GT&C Section 13.1)

---

91 As previously noted, Joint Petitioners produced an Xspedius template contract (XSP 000004-000005) in their December 7, 2004, supplemental response to BellSouth's Request for Production No. 16.

92 *See* XSP 000004, § 15.

93 (*See* BellSouth Exhibit "A", GT&C at § 10.5).

This issue is about who decides, in the first instance, disputes about the interconnection agreement that are within the expertise or jurisdiction of the Commission or the FCC. BellSouth believes the Commission or the FCC should decide such issues in the first instance, subject to review by the Courts.[94] The Joint Petitioners, on the other hand, want to bring all such disputes to a court of law, even if the Commission has jurisdiction and/or expertise to resolve the dispute. Moreover, under the Joint Petitioners' proposed language, a dispute about an interconnection agreement this Commission arbitrates and approves could be decided by a court in a state other than South Carolina.[95] For the following reasons, the Commission should adopt BellSouth's proposed language.

Interconnection agreements achieved through either voluntary negotiations or through compulsory arbitration are established pursuant to Section 252 of the 1996 Act, and Section 252(e)(1) requires that any interconnection agreement adopted by negotiation or arbitration be submitted to the Commission for approval. The Commission, therefore, is in the best position to resolve disputes that are within its expertise or jurisdiction and that relate to the interpretation or enforcement of an agreement that it approves pursuant to the 1996 Act.[96] The Kentucky Commission agrees, as it ruled that "disputes arising under . . . interconnection agreements must be brought before the Commission before they proceed to a court of general jurisdiction."[97]

---

94 (FL Tr. at 886; BellSouth Exhibit "A", GT&C at § 13.1).

95 SC Tr. at 439-40.

96 FL Tr. at 814; Blake Direct Testimony at 24 (SC Tr. at 236).

97 *Kentucky Order* at 7. In the *Florida Order*, the Florida Commission did not adopt BellSouth's position but noted that "this Commission has primary jurisdiction over most disputes arising from interconnection agreements and that a petition filed in an improper forum would ultimately be subject to being dismissed or held in abeyance while we addressed the matters within our jurisdiction." *Florida Order* at 15. The Mississippi Arbitration Panel ruled in a similar fashion. *Mississippi Order* at 23. The North Carolina and Georgia Commissions adopted the Joint Petitioners' position on this issue.

The U.S. Court of Appeals for the Eleventh Circuit used this same rationale to find that the 1996 Act authorizes state commissions to interpret interconnection agreements.[98] As stated by the court: "the language of § 252 persuades us that in granting to the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce *in the first instance* and to subject their determination to challenges in the federal courts."[99] Similarly, the FCC has held that, "due to its role in the approval process, a state commission is well-suited to address disputes arising from interconnection agreements."[100]

Contrary to these well-reasoned decisions, the Joint Petitioners' proposed language would allow them to ask a court in another state to resolve disputes about South Carolina interconnection agreements that this Commission arbitrates and that this Commission approves.[101] The Joint Petitioners concede that if they were to do so, the only way the Commission could participate in the resolution of those disputes would be for the Commission to ask the court in the other state to allow the Commission to participate as a party to the proceeding.[102] Clearly, the Commission should not adopt such an approach.

The apparent motivation of the Joint Petitioners in continuing to arbitrate this issue is to obtain the ability to go to a single forum to address a region-wide dispute and to avoid bifurcated

---

98 *See BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1277 (11th Cir. 2003).

99 *Id.* (emphasis added).

100 *Id.* (quoting *In re: Starpower*, 15 FCC Rcd at 11280 (2000)).

101 SC Tr. at 438.

102 This assumes, of course, that Act 175 authorizes the Commission to participate in such court proceedings. If it does not, then under the Joint Petitioners' proposed language, the Commission would have no say whatsoever in the way a court, in this or another state, interprets or implements an interconnection agreement that the Commission itself arbitrated and approved.

hearings.[103] The Joint Petitioners' proposed language, however, is unlikely to achieve this goal. For instance, the Joint Petitioners attempt to mitigate their concession that the state Commission and the FCC are experts in several matters by stating that, pursuant to the doctrine of primary jurisdiction, a court could refer these "expert" matters to the state commissions for resolution.[104] Invocation of this doctrine, however, leads to the same result the Joint Petitioners are attempting to avoid – bifurcated hearings. Specifically, the Joint Petitioners do not dispute that under the doctrine of primary jurisdiction, a court would resolve matters outside the expertise of a state Commission while nine state commissions would resolve matters within their expertise.[105]

Additionally, BellSouth's proposed language allows the Joint Petitioners to resolve a dispute in a *single* forum as it allows either Party to bring a dispute to the FCC. Clearly, the FCC has regulatory oversight over ILECs and CLECs and their obligations under the 1996 Act, and it has expertise to resolve disputes relating to the interpretation and implementation of the agreement.[106] Accordingly, the FCC is another available forum that the Joint Petitioners could employ to resolve disputes relating to the interpretation and implementation of the agreement.

Further, and contrary to the Joint Petitioners' claims in other proceedings, BellSouth's language does not result in this Commission changing or limiting the jurisdiction of courts in violation of the Constitution. BellSouth's language in no way limits, strips, or restricts the jurisdiction of any court. Rather, with this arbitration issue, the Commission will identify the specific forums, all of which may have jurisdiction, that the parties will use to address specific interconnection agreement disputes. BellSouth submits that, for various telecommunications policy reasons (including expertise, efficiency, knowledge, expediency, resource constraints,

---

103 *See* FL Tr. at 278, 281.
104 *See* FL Tr. at 463.
105 *See* Johnson Depo. at 81-82; FL Tr. at 599.
106 FL Tr. at 815-816; Blake Direct Testimony at 24 (SC Tr. at 236).

etc.), the Commission or the FCC should be the *initial* forum to address interconnection agreement disputes that are within their jurisdiction and expertise. Making such a finding does not equate to the Commission stripping a court of its constitutional authority.

In sum, the Commission should adopt BellSouth's language, which preserves the Commission's ability to resolve disputes that are within its expertise or jurisdiction while also providing the Joint Petitioners the option of going to a court of law for matters outside such expertise or jurisdiction.

Issue 12: Should the Agreement explicitly state that all existing state and federal law, rules, regulations, and decisions apply unless otherwise specifically agreed to by the Parties? (GT&C, Section 32.2)

This issue is *not* about whether BellSouth intends to comply with Applicable Law – BellSouth has agreed to do so.[107] Instead, this issue centers on how the Parties should handle disputes when one Party asserts that an obligation, right, or other requirement relating to telecommunications law is applicable even though that obligation, right, or requirement is not expressly memorialized in the interconnection agreement. BellSouth's concern – which, as explained below, is shared by at least three other commissions that have adopted BellSouth's position on this issue– is that after the parties and this Commission have spent a great deal of time negotiating and arbitrating an interconnection agreement that implements the law that was in effect at the time of the agreement's execution, the Joint Petitioners will: review a telecommunications rule or order that was in effect at the time the agreement was executed; interpret that rule or order in a manner that BellSouth could not have anticipated; claim that their after-the-fact interpretation creates a contractual obligation that is not specified in the

---

[107] *See* GT&C at § 32.1. Section 32.1 defines "Applicable Law" as "all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, injunctions, judgments and binding decisions and decrees that relate to its obligations under this Agreement." BellSouth has agreed to comply with Applicable Law.

interconnection agreement (even though the Joint Petitioners did not raise the issue during two years of negotiations); and seek to enforce that purported obligation against BellSouth.

It is clear from the Joint Petitioners' testimony in other proceedings that BellSouth's concern is not merely hypothetical:

> Q. Now do you believe that when the parties agree to something in the agreement that there should be an opportunity through this provision to reargue what the law means?
>
> A. Not only should it be an opportunity but we've done that from time to time.[108]

The North Carolina EEL audit proceeding was one such time.[109] The interconnection agreement at issue in that case was executed after the FCC issued its *Supplemental Order on Clarification* ("SOC") that, in part, addressed EEL audits. Although the *SOC* made it clear that parties could agree to different EEL audit provisions, and although the interconnection agreement contained EEL audit provisions that were different than those set forth in the *SOC,* NewSouth (one of the Joint Petitioners here) used this same "Applicable Law" argument to claim that all of the EEL audit provisions in the *SOC* were automatically incorporated into the interconnection agreement.[110] The North Carolina Commission rejected NewSouth's argument:

> NewSouth has also argued that the general principle that agreements are interpreted in light of the body of law existing at the time agreements are executed is part of Georgia law. NewSouth applies this principle by arguing that the entire SOC, as part of the existing law at the time the Agreement was executed,

---

108 GA Tr. at 435.

109 See *In re: BellSouth Telecommunications, Inc. v. NewSouth Communications, Corp.*, NCUC Docket No. P-772, Sub 7, *Order Granting Motion for Summary Disposition and Allowing Audit*, (Aug. 24, 2004).

110 Both NewSouth and NuVox have taken the same position in EEL audit proceedings that are pending before this Commission. *See,* BellSouth's Complaint and Request for Summary Disposition in Docket No. 2004-63-C (NewSouth EEL Audit); BellSouth's Motion for Summary Disposition in Docket No. 2005-82-C (NuVox EEL Audit).

> must be read into the Agreement, and that the Parties would have had to have included an express statement excluding the SOC from the Agreement if they wanted to be relieved from the requirements and restrictions of the SOC. The Commission does not agree.[111]

The North Carolina Commission explained that "having entered into the Agreement, the parties' dealings are now governed by the specific terms of the Agreement and not the general provisions of Section 251 and 252 of the [1996] Act or FCC rulings and orders issued pursuant to those stated sections."[112]

An interconnection agreement should provide certainty as to the Parties' respective obligations. BellSouth's proposed language does just that. It ensures that (1) no Party is penalized by the lack of clarity or silence in this agreement relating to its obligations under telecommunications law; and (2) no Party has the opportunity to renegotiate provisions of the contract based on a new reading of Applicable Law.[113] As such, BellSouth's proposed language is consistent with rulings of the Florida Commission, the Kentucky Commission, and the North Carolina Commission Panel [114] that rejected the Joint Petitions' position on this issue. [115]

---

111 *Id.* at 8.

112 *Id.* at 6.

113 BellSouth's proposed language addresses this concern as it provides that "to the extent that either Party asserts that an obligation, right or other requirement, *not expressly memorialized herein*, is applicable under this Agreement by virtue of a reference to an FCC or Commission rule or order, or *with respect to substantive telecommunications law only*, Applicable Law," and the other Party disputes such right, obligation, or requirement, the Parties agree to submit the dispute to dispute resolution before the Commission and agree that any finding that such right or obligation exists prospectively only. Clearly, if the Commission determined that the obligation should have applied retroactively, the Commission could include such a requirement in its order.

114 *See Florida Order* at 16 ("The purpose of an agreement is to create specific obligations to do or not to do a particular thing. We find it is essential to have a document that contains specific terms and conditions. That being said, a provision in the Agreement stating when explicit language would apply and when it would not, could cause more confusion."); *Mississippi Order* at 25 (same); *North Carolina Order* at 20 (The Joint Petitioners' language "amounts to a 'roving expedition' for a party to seek out other law, 'no matter how discreet,' to supply terms for the Agreement. The Commission believes this goes too far and is out of

These commission rulings in favor of BellSouth's position are not surprising in light of how unworkable the Joint Petitioners' position is. The Joint Petitioners take the position that the law in effect at the time of execution of the agreement is automatically incorporated into the Agreement, unless the Parties expressly agree otherwise.[116] Taken to its logical extreme, this means that interconnection agreements would consist only of a list of all instances where the parties agreed to something other than Applicable Law. NuVox's own witness, however, conceded that he could not list all of the instances in which the Parties agreed to something other than Applicable Law.[117] Consequently, the Joint Petitioners' language is unworkable and defeats the entire purpose of negotiation and arbitration pursuant to Section 252 of the 1996 Act (as well as the efforts of the Parties since June 2003).[118]

Additionally, under the Joint Petitioners' position, state unbundling laws arguably would be automatically incorporated into this Section 252 agreement upon execution, unless expressly excluded.[119] The Joint Petitioners further contend that, even if federal law provides that

---

harmony with what a standard applicable law provision is supposed to do."); *Kentucky Order* at 8 ("The Commission is concerned that adopting the Joint Petitioners' contract term would lead to a lack of understanding in the interconnection. . . . . Accordingly, BellSouth's proposed language should be adopted."). Unlike the Florida and Kentucky Commissions and the Mississippi Arbitration Panel, the North Carolina Commission modified BellSouth's proposed language by deleting the reference to any finding that an obligation exists applies prospectively only. *See North Carolina Order* at 20-21. However, this minor revision to BellSouth's language does not negate the fact that the North Carolina Commission rejected the Joint Petitioners' position.

[115] The Georgia Commission adopted the Joint Petitioners' proposed language on this issue. *Georgia Order* at 12.

[116] FL Tr. at 220; Russell Depo. at 142; 145.

[117] *Id.*

[118] The Parties have been negotiating the instant agreement since at least June 2003. (FL Tr. at 218).

[119] FL Tr. at 221, 223; Falvey Depo. at 90-91. Ms. Johnson also stated that KMC could hold BellSouth in breach of these unstated state law obligations. (Johnson Depo. at 92). In another instance where the Joint Petitioners do not agree on an issue, however, Mr. Falvey stated that state unbundling laws would not be incorporated into the agreement and that the Joint Petitioners

BellSouth no longer has an obligation to provide an unbundled element, BellSouth could still be obligated under state law to provide that element via this agreement, even though the agreement never referenced state unbundling law.[120] An ILEC like BellSouth, however, in not required to address state unbundling provisions in an interconnection agreement that is negotiated or arbitrated under Section 252 of the 1996 Act. Instead, BellSouth is only obligated to negotiate interconnection agreement provisions that address the duties listed in Section 251(b) and (c) of the 1996 Act.[121] The Joint Petitioners' position, therefore, is inconsistent with the entire purpose of entering into a Section 252 arbitration agreement as well as the doctrine of preemption.

For all of these reasons, the Commission should adopt BellSouth's proposed language and reject the Joint Petitioners' proposed language.

Issue 65: Should BellSouth be allowed to charge the CLEC a Tandem Intermediary Charge for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic? (Attachment 3, Section 10.8.1 (NCS/NVS))

BellSouth is not required to provide a transit service at all, and it is not required to charge TELRIC rates for any transit service that it voluntarily provides. Additionally,[122] BellSouth incurs costs in providing a transit service that are not recovered in other rates under the interconnection agreement. Like the Florida and Georgia commissions and the Mississippi Arbitration Panel, therefore, this Commission should allow BellSouth to charge NuVox[123] a

---

could not hold BellSouth in breach for state unbundling laws that are not expressly addressed in the agreement. (Falvey Depo. at 101; 103-04).

120 FL Tr. at 224-225.

121 *Coserv Limited Liab. Corp. v. Southwestern Bell Tel.*, 350 F.3d 482, 487 (5th Cir. 2003). The Court further stated that a state commission "may arbitrate only issues that were the subject of the voluntary negotiations" and that "[a]n ILEC is clearly free to refuse to negotiate any issue other than those it has a duty to negotiate under the [1996] Act when a CLEC requests negotiation pursuant to §§ 251 and 252." *Id.* at 488.

122 Blake Direct Testimony at 35.

123 This issue remains unresolved only with regard to NuVox. Xspedius and BellSouth have resolved Issue 65 on a region-wide basis.

Tandem Intermediary Charge ("TIC").

The FCC's Wireline Competition Bureau has declined to find that ILECs like BellSouth have an obligation to provide a transit function at TELRIC prices:

> We reject AT&T's proposal because it would require Verizon to provide transit service at TELRIC rates without limitation. While Verizon as an incumbent LEC is required to provide interconnection at forward-looking cost under the Commission's rules implementing section 251(c)(2), the Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit service under this provision of the statute, nor do we find clear Commission precedent or rules declaring such duty. In the absence of such a precedent or rule, we decline, on delegated authority, to determine for the first time that Verizon has a section 251(c)(2) duty to provide transit service at TELRIC rates. Furthermore, any duty Verizon may have under section 251(a)(1) of the Act to provide transit service would not require that service to be priced at TELRIC.[124]

The Bureau subsequently reaffirmed these principles in denying AT&T's request for reconsideration, stating that (1) it "did not find that Verizon had a legal obligation to provide transit service at TELRIC"; (2) it did "not agree with AT&T's assertion that the Virginia Commission would have been required to agree with AT&T that Verizon must provide transit service under the Act, nor do we agree that the Bureau was required to so conclude."[125] The Bureau's analysis was confirmed by the FCC itself in the *Triennial Review Order*. In that Order, the FCC clearly pronounced that "[t]o date, the [FCC]'s rules have not required incumbent LECs to provide transiting."[126] Accordingly, and as explained in more detail in the Post-Hearing Brief

---

[124] Memorandum Opinion and Order, *In the Matter of Petition of Worldcom, Inc. Pursuant to Section 252(E)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 17 FCC Rcd. 27,039 at ¶117 (July 17, 2002).

[125] Order on Reconsideration, *In the Matter of Petition of Worldcom, Inc. Pursuant to Section 252(E)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 19 FCC Rcd. 8467 at ¶3 (May 14, 2004).

[126] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket Nos. 01-338 et al., FCC 03-36, 18 FCC Rcd 16978 at ¶ 534, n. 1640 (Aug. 21, 2003)

BellSouth filed with the Commission in Docket No. 2005-63-C (the transit tariff docket), BellSouth has no obligation to provide transit service to NuVox.

Although not required to do so, BellSouth has voluntarily agreed to provide transit service to NuVox. BellSouth, however, has not voluntarily agreed to do so at TELRIC rates. The FCC rulings discussed above make it clear that BellSouth is not required to charge TELRIC rates for any transit function it voluntarily provides. Moreover, in providing transit service, BellSouth incurs costs in (1) "sending records to the CLECs identifying the originating carrier"; (2) "ensuring that BellSouth is not being billed for a third party's transit traffic"; and (3) handling "disputes arising from the failure on the part of the CLECs to enter into traffic exchange arrangements directly with terminating carriers."[127] These costs are not being recovered through tandem switching, common transport, or any other charges in the interconnection agreement.[128] BellSouth, therefore, is entitled to charge a non-TELRIC TIC rate for the transit service it voluntarily provides NuVox (and that NuVox uses).

BellSouth proposes a TIC rate of $.0015. This is compatible with the $.0025 composite rate approved by the Georgia Commission,[129] and it is the same as the $.0015 additive rate

---

127 Blake Direct Testimony at 35 (SC Tr. at 247).

128 *Id.*

129 *See BellSouth's Petition for a Declaratory Ruling Regarding Transit Traffic*, Docket No. 16772-U, *Order on Transit Traffic Involving Competitive Local Exchange Carriers and Independent Telephone Companies*, G.P.S.C. (Mar. 24, 2005). In the companion arbitration proceedings, the Georgia Commission approved this same transit rate and reiterated that "the FCC Wireline Competition Bureau determined that the rate for transiting service did not need to be TELRIC-compliant."). *Georgia Order* at 26. The Joint Petitioners argue that BellSouth did not offer a composite TIC rate in this arbitration and thus the Commission should disregard the Georgia Commission's decision. This argument fails to distinguish the arbitration from the Georgia Commission's Docket No. 16772-U. The fact is that BellSouth offered Joint Petitioners the composite TIC rate of $.0025 in the hopes of resolving the issue in light of the Georgia Commission's decision in Docket No. 16772-U. Regardless of whether the TIC rate is a composite rate or a stand-alone rate, BellSouth never has waive red from its position that TELRIC rates do not apply to the TIC. (GA Tr. at 1104-05).

approved by the Florida Commission. In approving this same additive rate, the Florida Commission stated:

> The fact that the TIC is an additive is also noted, and we understand there are costs associated with providing a transiting function, such as providing billing records to the terminating carrier and the cost of reconciling improper billing by the terminating carrier when BellSouth is the intermediary or transiting carrier. . . Therefore, we find BellSouth's costs for providing the billing records that it indicated were not being recovered through tandem switching and common transport charges and the fact that some transiting calls may require reconciliation when third party carriers improperly bill BellSouth must be recognized.[130]

For all the forgoing reasons, the Commission should adopt BellSouth's proposed $.0015 TIC rate.

In arguing against the TIC, NuVox claims that it does not want the call records that BellSouth sends to the terminating carrier as part of the transit service. Provision of these records, however, is part of BellSouth's transit service. If NuVox does not want to receive or pay for these records, it can bypass BellSouth's transit service by directly interconnecting with other carriers like other Joint Petitioners do.[131] As confirmed by KMC witness Mertz:

> Q. All right. Now, you would agree with me that KMC could avoid using BellSouth's service by directly interconnecting with NuVox, correct?
>
> A. Correct.
>
> Q. And KMC actually does interconnect with several different carriers, is that right?
>
> A. Yes.
>
> * * *

---

[130] *Florida Order* at 52-53. *See Mississippi Order* at 29 (finding "that there is no support for the proposition that BellSouth must provide this transit function under Section 251.").

[131] Blake Rebuttal Testimony at 32 (SC Tr. at 290).

Q. When you directly interconnect with the terminating carrier, you avoid the BellSouth transiting function?

A. Yes, we do.[132]

By complaining about paying for these records, NuVox essentially is wanting (1) BellSouth's transit service for *free*; and (2) the terminating carrier not to be able to identify Joint Petitioners as the originating carrier so that they can avoid paying reciprocal compensation and terminate calls for *free*. NuVox clearly is not entitled to this.

NuVox also opposes the TIC because it is "entirely new" as to them. The Commission should reject this argument. BellSouth has charged other CLECs the TIC in the past. More importantly, the fact that the NuVox may have been receiving transit service for free in the past does not mean that BellSouth must continue providing the service for free or that BellSouth must provide the service at TELRIC rates.

Issue 86B:* (B) *How should disputes over alleged unauthorized access to CSR information be handled under the Agreement? (Attachment 6, Sections 2.5.5.2 and 2.5.5.3)

The crux of this issue is simple. How long does a Party that has reviewed a customer's records need to produce documentation establishing that it complied with the law by obtaining a customer's authorization to review the customer's records *prior* to reviewing such records? As explained below, and as conceded by the Joint Petitioners, two weeks is more than a sufficient amount of time for the parties to do so. Accordingly, the Commission should adopt BellSouth's language for Issue 86(B).

The Joint Petitioners concede that customer service record ("CSR") information contains Customer Proprietary Network Information ("CPNI"), and that BellSouth and the Joint Petitioners have an obligation under federal law to protect the unauthorized disclosure of

---

[132] FL Tr. at 411-12.

CPNI.[133] Given these obligations, the parties have agreed to refrain from accessing CSR information without an appropriate Letter of Authorization ("LOA") from a customer and to "access CSR information only in strict compliance with applicable laws."[134] The parties also have agreed that upon request by one party, the other party "shall use best efforts" to provide the requesting party an appropriate LOA within seven (7) business days.[135] Seven business days equates to at least nine (9) calendar days.[136]

Under BellSouth's most recent proposed language, if the party receiving such a request fails to produce an appropriate LOA within the allotted time period (7 business days), the requesting party will provide written notice specifying the alleged noncompliance and advising that access to ordering systems may be suspended in five (5) days if such noncompliance does not cease.[137] The requesting party will send this notice via email to a person designated by the other party to receive such notice.[138] Accordingly, Joint Petitioners' concerns about a "buried" written notice sitting on someone's desk for days have been addressed.

Now, however, the Joint Petitioners appear to assert that producing an appropriate LOA within 5 days (following the expiration of 7 business days wherein an accused party fails to produce such LOA) is an unreasonably short period of time to take corrective action.[139] The Joint Petitioners, however, have acknowledged that producing an appropriate LOA is something that could take as little as two (2) business days.[140] Additionally, immediate termination of

---

133 FL. Tr. at 629.
134 FL Tr. at 629; BellSouth FL Hearing Ex. 22 (Att. 6, § 2.5.5).
135 FL Tr. at 630; Att. 6, § 2.5.5.1.
136 FL Tr. at 630.
137 FL Tr. at 630. *See* BellSouth Exhibit A, Att. 6, §§ 2.5.5.2 and 2.5.5.3.
138 *Id.*
139 *See* FL Tr. at 631.
140 *See* Falvey Depo. at 232-233.

service because of fraudulent, prohibited, or unlawful use of service is not a new concept as the Joint Petitioners' South Carolina tariffs authorize termination under similar circumstances.[141] Moreover, the Commission's regulations also allow for termination of service in cases of unauthorized use of a service or illegal or willful misuse of service.[142] The Joint Petitioners acknowledge that under BellSouth's most recent proposed language, if the accused party disputes the allegations of noncompliance, then the requesting party will seek an expedited resolution of the CSR dispute from the appropriate regulatory body pursuant to the dispute resolution provisions contained in the agreement's General Terms & Conditions section.[143] The Joint Petitioners also acknowledge that the agreement's dispute resolution provisions require the parties to continue meeting all contractual obligations while a dispute is pending.[144] Thus, the Joint Petitioners' concerns that BellSouth may take corrective action during the pendency of such a dispute have been obviated.

Indeed, in approving BellSouth's language for this issue, the Florida Commission recognized that Joint Petitioners' fears were unfounded:

> [W]e conclude that in the event that the alleged offending party disputes the allegations of unauthorized access to CSR information . . . the alleging party shall seek expedited resolution form the appropriate regulatory body pursuant to the dispute resolution provision in the Interconnection Agreement's' General Terms and Conditions section. The alleging party shall take no action to terminate the alleged offending party during any such pending regulatory proceeding. If the alleged offending party does not dispute the allegation of unauthorized access to CSR information,

---

141 Xspedius SC Tariff § 2.5.5(F); NuVox SC Tariff § 2.7.3(D); KMC SC Tariff § 2.5.5(F). *See also* FL Tr. at 634-635 (Xspedius witness Jim Falvey conceding that Xspedius' tariffs give Xspedius the right to terminate service because of fraudulent or prohibited use of service).

142 S.C. Code Regs. 103-625.a, k.

143 FL Tr. at 632-633; *see* BellSouth Exhibit A, Att. 6, §§ 2.5.5.2, 2.5.5.3.

144 FL Tr. at 633-634; GT&Cs, § 13.

> BellSouth may suspend or terminate service under the time lines proposed by BellSouth.[145]

The Florida Commission's analysis is sound, and this Commission should reach a similar conclusion.[146]

Moreover, under BellSouth's proposed language, prior to any action being taken by the requesting party, the accused party has at least two full weeks to produce an appropriate LOA.[147] Two weeks is more than sufficient time to produce documentation that the Joint Petitioners are legally and contractually obligated to keep. This is particularly true here, given that: (1) the Joint Petitioners cannot identify any prior dispute regarding unauthorized access to CSR information;[148] (2) the Joint Petitioners have acknowledged that producing an appropriate LOA is something that could take as little as two (2) business days;[149] (3) the Joint Petitioners have a contractual obligation to use "best efforts" to produce an appropriate LOA;[150] and (4) the Joint Petitioners affirmatively state that they would exercise "good faith" to investigate any allegation regarding unauthorized access to CSR information.[151]

Based on experience in other state proceedings, BellSouth expects the Joint Petitioners may assert one or more of the following additional arguments:

---

145 *Florida Order* at 56.

146 The North Carolina and Kentucky Commissions have ruled otherwise on this Issue. *See Kentucky Order* at 16; *North Carolina Order* at 62. The Georgia Commission adopted some of the Joint Petitioners' positions (such as requiring email notice to recipients designated in the General Terms and Conditions section and not invoking any remedy if an allegation is disputed) and some of BellSouth's positions (such as rejecting the Joint Petitioners' "systemic violation" language and adopting BellSouth's proposed language that "the alleging Party will state that additional applications for service may be refused"). *Georgia Order* at 29.

147 BellSouth Exhibit A, Att. 6, §§ 2.5.5.2, 2.5.5.3.

148 Falvey Depo. at 253.

149 *See* Falvey Depo. at 232-233.

150 FL Tr. at 630; Att. 6 § 2.5.5.1.

151 Falvey Depo. at 236-237.

BellSouth retains "sole discretion to impose these draconian sanctions." Under BellSouth's proposal, however, no termination or suspension of service will occur if a party disputes the CSR non-compliance allegations.

BellSouth is seeking to impose "an extreme and one-sided remedy." BellSouth's proposal, however, is reciprocal.[152]

BellSouth's proposed language "inexplicably retains the menu of debilitating pull-the-plug remedies and impossibly short response windows." BellSouth's proposed remedies, however, are triggered only if a party ignores a request to produce an LOA and thus disregards its contractual and legal obligation to obtain customer permission before accessing customer records.[153] Moreover, the Joint Petitioners have acknowledged that producing an appropriate LOA is something that could take as little as two (2) business days,[154] and under BellSouth's proposal, a party has seven times that amount of time (at least fourteen days) to produce an appropriate LOA prior to any corrective action being undertaken.[155]

There is a supposed "conflict" in BellSouth's proposed contract language and BellSouth's witness Scot Ferguson's hearing room testimony on this issue. In other proceedings, however, the Joint Petitioners have failed to identify the so-called "conflicting" contract language. Moreover, Mr. Ferguson plainly testified that in the event of a CSR-related dispute, BellSouth would abide by the dispute resolution provision and thus the parties would continue to operate business as usual during the pendency of a dispute.[156]

As explained above, BellSouth's proposed language addresses all of the Joint Petitioners' concerns, and it gives the parties sufficient recourse if a party refuses to comply with its legal and contractual obligations regarding the protection of CSR information. The Commission, therefore, should adopt BellSouth's most recent proposed language on this issue.

---

152 SC Tr. at 484

153 FL Tr. at 629-631.

154 *See* Falvey Depo. at 232-233.

155 *See* FL Tr. at 631; BellSouth Exhibit A, Att. 6, §§ 2.5.5.2 and 2.5.5.3.

156 *See* SC Tr. at 478; FL Tr. at 77-779. Citing page 784 of the Florida hearing transcript, the Joint Petitioners may also argue that BellSouth witness Ferguson was unable to explain BellSouth's need for its proposed remedies for Issue 86(B). This is inaccurate – page 784 of the Florida transcript has nothing to do with Issue 86(B). Pages 782-784 of the Florida transcript, plainly indicate that such testimony is associated with Issue 103.

Issue 88: What rate should apply for Service Date Advancement (a/k/a service expedites)? (Attachment 6, Section 2.6.5)

The Parties have settled this issue and thus it is no longer the subject of the arbitration proceeding.

Issue 97: When should payment of charges for service be due? (Attachment 7, Section 1.4)

Payment for services under the new interconnection agreements should be due at the same time that payment for services under the existing interconnection agreements have been due for several years: by the next bill date. The Joint Petitioners, like all CLECs, have a set bill date for every bill they receive.[157] For example, a NuVox invoice that is dated the 5th day of a given month will always be dated the 5th day of every month, and it will always be due by the 5th day of the following month. Based on the bill date, therefore, Joint Petitioners know the exact date when payment is due for each bill -- by the next bill issuance date.[158]

The Joint Petitioners concede that their monthly billings are reasonably predictable and that Joint Petitioners themselves are in the best position to predict (or estimate) their monthly billings.[159] Further, NuVox witness Russell has testified on several occasions that, for at least a two year period, *NuVox has paid all of its BellSouth bills in a timely manner.*[160] NuVox's timely payment performance is significant, given the fact that NuVox repeatedly: (1) points out that it receives over 1,100 bills per month from BellSouth;[161] and (2) touts its "stellar" payment history.[162] This uncontradicted testimony is inconsistent with the Joint Petitioners' position that they need more time to pay bills under their new interconnection agreements than they have had under their existing interconnection agreements.

---

157 Blake Rebuttal Testimony at 36; FL Tr. at 901.
158 Blake Rebuttal Testimony at 36; FL Tr. at 1032.
159 Russell Depo. at 237-238; Falvey Depo at. 315-316.
160 Russell Depo. at 231; FL Tr. at 264; GA Tr. at 513.
161 Joint Petitioners' Response to FL Staff's Interrogatory No. 71.
162 FL Tr. at 253.

Moreover, the Joint Petitioners' proposal would result in an ever extending, revolving payment due date that would be difficult to administer. And although implementing their proposal would require modifications to BellSouth's billing systems,[163] the Joint Petitioners are unwilling to pay for those modifications.[164] No modifications are warranted, however, because this Commission and the FCC have already determined that BellSouth's current billing practices are nondiscriminatory.[165]

The Joint Petitioners' request for special payment terms also is contrary to the 1996 Act. Section 251(c) requires BellSouth to provide interconnection services and UNEs on rates, terms, and conditions that are just, reasonable and non-discriminatory. For billing purposes, BellSouth satisfies these nondiscrimination obligations by delivering bills to CLECs in the same time and manner that BellSouth delivers bills to its own retail customers.[166] Additionally, BellSouth pays SEEM penalties if BellSouth fails to deliver CLEC bills in a timely manner.[167]

It is not surprising, therefore, that the Florida Commission and the Mississippi Arbitration Panel[168] approved BellSouth's position on this issue. In concluding that payment of

---

163 FL Tr. at 902.

164 FL Tr. at 416; Blake Rebuttal Testimony at 37.

165 Blake Rebuttal Testimony at 37 (SC Tr. at 295). Memorandum Opinion and Order, *In the Matter of Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Authorization to Provide In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina,* WC Docket, No. 02-150, FCC 02-260 (Rel. Sept. 18, 2002) at ¶ 174 ("Like the state commissions, we find that BellSouth provides nondiscriminatory access to its billing functions. BellSouth's performance data demonstrates its ability . . . to provide wholesale bills in a manner that gives competing carriers a meaningful opportunity to compete.")

166 Blake Rebuttal Testimony at 37; FL Tr. at 1047.

167 Blake Rebuttal Testimony at 37; FL Tr. at 902.

168 *Florida Order* at 64; *Mississippi Order* at 35. The Kentucky Commission also initially adopted BellSouth's position. *Kentucky Order* at 17 ("The Commission finds that BellSouth's proposed due date is reasonable. Joint Petitioners have been able to comply with this standard."). However, the Kentucky Commission – without any meaningful explanation – reversed itself on this issue on reconsideration. *Kentucky Recon Order* at 21-22. The North

charges shall be made on or before the next bill (payment due) date, the Florida Commission specifically found that

> BellSouth's current bill rendering practices are reasonable. As noted in Hearing Exhibit 2 and 19, BellSouth's SQM performance results indicate that, on average, BellSouth is delivering bills to its wholesale customers at "parity" with its own retail customers. We find BellSouth shall not be ordered to make substantive changes to its billing systems on behalf of the Joint Petitioners, and at its own expense, in order to exceed "parity" performance.[169]

This Commission should reach the same conclusion as the Florida Commission.

In arguing against BellSouth's position, the Joint Petitioners suggest that BellSouth's payment terms would be considered "unacceptable in most commercial settings."[170] The Joint Petitioners' own tariffs and billing practices, however, are inconsistent with this suggestion. NuVox, for example, requires its South Carolina customers to pay their bills upon receipt,[171] and the retail tariffs of KMC and Xspedius require their customers to pay bills within thirty (30) days of bill issuance.[172] And while they claim that BellSouth's proposed language does not give them enough time to pay their bills, the Joint Petitioners expect BellSouth to pay the bills it receives from the Joint Petitioners *within 20 days of the bill date.*[173]

The Joint Petitioners also have suggested that they receive BellSouth bills in about 7

Carolina Commission ruled in favor of Joint Petitioners on this issue. The Georgia Commission ruled that bills are due 30 days after the date the bill is sent out by BellSouth. *Georgia Order* at 31.

169 *Florida Order* at 63-64.

170 FL Tr. at 68.

171 NuVox SC Tariff §§ 2.7.2.A & 2.7.2.B.

172 KMC SC Tariff § 2.5.2(A) & (B); Xspedius SC Tariff § 2.5.2(A) & (B).

173 Joint Petitioners' Supplemental Response to FL Staff Interrogatory Number 72 (which includes an Xspedius bill to BellSouth dated April 1, 2004, with payment due April 20, 2004). In contrast, the payment terms that BellSouth seeks in this arbitration (payment on or before payment due date) are the same payment terms required of BellSouth's retail customers. Blake Rebuttal Testimony at 36.

seven days or more.[174] This suggestion, which is based on outdated and inaccurate bill studies,[175] is wrong. During cross-examination in Florida, Joint Petitioner witness Mertz acknowledged that the SQM/SEEM plan measures the time it takes BellSouth to deliver bills to CLECs.[176] The SQM aggregate results for April 2004 through March 2005 show that CLECs received their BellSouth bills in about 3 or 4 days, on average.[177] Further, Mertz conceded that the SQM billing invoice timeliness results for KMC, for the first 3 months of 2005, were substantially similar to the CLEC-aggregate results.[178] The SQM aggregate results for South Carolina for April 2004 through March 2005 and the CLEC-specific results for the Joint Petitioners for the first three months of 2005 are substantially similar: CLECs and the Joint Petitioners obtain their bills from BellSouth in 3 to 4 days – not the 7 or more days suggested by the Joint Petitioners.[179]

The Joint Petitioners also have argued that they need more time to pay their bills because BellSouth's bills are "voluminous and complex" and are "often incomplete and sometimes incomprehensible."[180] Despite these unfounded characterizations of BellSouth's bills,[181] the fact

---

174 Joint Petitioners Direct Testimony at 82.

175 The NuVox bill study concluded in July 2003. (Russell FL Staff Depo. at 66) The NewSouth bill study was conducted prior to NuVox/NewSouth merger (May 2004) and conducted outside of purview of NewSouth witness Russell. (*Id* at 64). The Xspedius bill study commenced in December 2003 and concluded four to eight months later. (Falvey Depo at 311-312). And, KMC did not conduct a bill study. (FL Tr. at 420-421).

176 FL Tr. at 417.

177 FL BellSouth Exhibit 19.

178 FL Tr. at 422-423.

179 Blake Rebuttal Testimony at 38, Exhibit KKB-7.

180 Joint Petitioners Direct Testimony at 81-82 (SC Tr. at 96-97).

181 The Joint Petitioners failed to produce one example of an incomplete or incomprehensible bill. To the contrary, the only BellSouth bill the Joint Petitioners presented at any hearing to support their claim was a bill that was mailed to NuVox and that NuVox actually paid early! (GA Tr. at 1123).

remains that NuVox, which claims to receive over 1,100 bills per month from BellSouth,[182] *has paid all of its BellSouth bills in a timely manner for at least two years.*[183] These undisputed facts refute the Joint Petitioners' claims that they have insufficient time to review and pay their bills. Moreover, to minimize any perceived delay in receiving their bills, the Joint Petitioners can (and do) elect to receive their bills electronically.[184] Further, if any Joint Petitioner has billing questions, nothing precludes the Joint Petitioner from contacting BellSouth with such questions, and BellSouth will respond in a prompt manner.[185] Additionally, nothing prevents the Joint Petitioners from exercising their rights under the agreed upon billing dispute resolution provision if any Joint Petitioner received a bill that appears incomplete, confusing or late.[186]

BellSouth anticipates that the Joint Petitioners will cite excerpts from rulings from Kansas ("*Kansas Order*") and Oklahoma ("*Oklahoma Order*")[187] in support of their request for additional time to pay their bills. Assuming, for purposes of argument only, that the *Kansas Order* has any relevance, the facts are materially different and thus the *Kansas Order* has no application to the evidence presented in this arbitration. Specifically, in the *Kansas Order*, Xspedius claimed it received SWBT bills, on average, 16 days after the bill date.[188] Here, Xspedius claims it receives BellSouth bills, on average, 6 days after the bill date,[189] and the

---

182 Joint Petitioners' Response to Staff's Interrogatory No. 71.
183 Russell Depo. at 231; FL Tr. at 264; GA Tr. at 513.
184 Russell FL Staff Depo. at 66; Johnson Depo. at 297-298; Falvey Depo. at 305.
185 Blake Rebuttal Testimony at 36; FL Tr. at 902.
186 FL Tr. at 901-902; Att. 7, § 2.
187 The *Kansas Order* is attached hereto as Exhibit C. Given the voluminous nature of the *Oklahoma Order* (over 900 pages), only an excerpt of the such Order is included in Exhibit C.
188 *See Kansas Order* at 13-14.
189 Joint Petitioners' Direct Testimony at 82.

SQM data shows that Joint Petitioners (including Xspedius) receive their bills, on average, in 3 or 4 days.[190]

Finally, in other proceedings, the Joint Petitioners have suggested that BellSouth's testimony on this issue measured the time to pay the Joint Petitioners' bills from the date of receipt. This argument is irrelevant, and it mischaracterizes BellSouth's testimony. As Ms. Blake testified, BellSouth used the date it received bills to provide a meaningful way to measure its payment history with the Joint Petitioners because certain Joint Petitioners could not provide BellSouth with a timely bill.[191]

In sum, the Joint Petitioners should be required to pay their bills on or before the payment due date, just as they have been required to do for years under their current interconnection agreements.[192] BellSouth requires the same of its retail customers, and Joint Petitioners impose the same or more stringent payment requirements on their retail customers. Joint Petitioners have offered no credible or compelling reason why they should be given special, preferential billing treatment. Accordingly, the Commission should reject the Joint Petitioners' request for special treatment, and adopt BellSouth's proposed language[193] on Issue

---

190 Blake Rebuttal Testimony at 38; Exhibit KKB-7 (relevant SQM reports).

191 GA Tr. at 1136.

192 The NewSouth/Alltel interconnection agreement (attached to Blake's Rebuttal Testimony as Exhibit KKB-11) indicates that NewSouth (i.e. NuVox) voluntarily agreed to payment terms with Alltel that it so vehemently opposes in this arbitration.

193 If it would resolve the issue, BellSouth would be willing to agree to the following language: Payment Due. Payment for billed services sent electronically is due on or before the next bill date (Payment Due Date). If <<customer_short_name>> does not receive BellSouth's bill within eight (8) days of the bill date <<customer_short_name>> may notify its BellSouth billing contact. Upon BellSouth's notification to <<customer_short_name>> of a failure to receive a payment and <<customer_short_name>>'s determination that the bill has not been received, <<customer_short_name>> will inform BellSouth of the non-receipt of that particular bill. Although the actual bill date on the bill will not change as a result of such notification by <<customer_short_name>> or BellSouth's notification to <<customer_short_name>>, BellSouth shall waive late payment charges and defer normal collections for such payment for thirty (30)

97.[194]

Issue 100: Should CLEC be required to pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination? (Attachment 7, Section 1.7.2)

The Joint Petitioners acknowledge that BellSouth has the right to suspend or terminate service for nonpayment.[195] BellSouth acknowledges that it will not commence any suspension or disconnection activity involving amounts that are subject to a billing dispute.[196] This issue, therefore, arises only when a Joint Petitioner does not pay *undisputed* amounts that are past due.[197]

Given these circumstances, if a Joint Petitioner receives a notice of suspension or termination from BellSouth because the Joint Petitioner has not timely paid amounts that are not subject to a billing dispute, the Joint Petitioner should be required to pay all undisputed amounts that are past due as of the date of the pending suspension or termination action. In other words, if other undisputed amounts become past due between the time BellSouth issues the notice of suspension or termination and the date of the pending suspension or termination action, a Joint

---

days after <<customer_short_name>>'s notification to BellSouth or BellSouth's notification to <<customer_short_name>>. Information required to apply payments must accompany the payment including the Billing Account Numbers (BAN) to which the payment is to be applied; the invoices paid; and the amount to be applied to each BAN and invoice (Remittance Information). Payment is considered to have been made when received by BellSouth. Payment for billed services sent manually will be due on or before the next bill date and is payable in immediately available funds. Payment is considered to have been made when received by BellSouth.

[194] Regarding Issue 97, the Joint Petitioners assert that they will accept any of the rulings rendered in various BellSouth/DeltaCom arbitration proceedings. What the Joint Petitioners neglected to state is that they have rejected the payment and deposit terms that DeltaCom and BellSouth actually agreed upon and which are included in DeltaCom's interconnection agreement. (Blake SC Rebuttal Testimony Exhibit KKB-9 contains the entire DeltaCom/BellSouth payment and deposit terms).

[195] (FL Tr. at 261).

[196] *Id.*

[197] *See* BellSouth Exhibit A, Att. 7, § 1.7.2).

Petitioner should have to pay those undisputed past-due amounts as well as the undisputed past-due amounts that were identified in the notice. This is a fair and workable approach for several reasons.

First, BellSouth's proposed language provides for written notice and a reasonable opportunity for Joint Petitioners to pay past due undisputed amounts owed prior to service discontinuance. Additionally, as noted earlier, the Joint Petitioners know when they receive bills, they know when the bills are due, and they admit that the amount of such bills can be predicted with a reasonable degree of accuracy.[198] And, if for some reason the Joint Petitioners are not clear as what undisputed amounts are past due, they can contact BellSouth with any questions they may have regarding amounts owed, and BellSouth will cooperate to promptly answer any billing related questions.[199]

The Joint Petitioners object to this approach, claiming that it somehow amounts to a "shell game" of guessing what additional past due amounts must be paid in order to avoid suspension or termination.[200] BellSouth has revised its proposed language to address this stated concern about perceived "guesswork." BellSouth's revised proposed language states that, upon request, BellSouth will advise the Joint Petitioners of the additional undisputed amounts that have become past due since the issuance of the original notice of suspension or termination.[201] This revised proposal eliminates any legitimate concerns the Joint Petitioners may have.

Even without this proposed revision, however, BellSouth's Response to FL Staff Interrogatory No. 117 unquestionably demonstrates that a CLEC that fails to timely pay undisputed amounts owed can maintain constant communication with BellSouth's collections

---

198 *See* Item 97, *supra*.
199 *Id.*
200 Joint Petitioners Direct Testimony at 86.
201 *See* BellSouth Exhibit A, Att.7, § 1.7.2.

group and that when it does, the CLEC is provided with an aging report(s) that shows, by billing account number: current charges; past due charges; disputed charges; total past due amount owed less current charges and disputed charges; and the ability to determine amounts that will become past due during the notice period.[202] Joint Petitioners' witness Russell admitted that he had never seen a BellSouth aging report[203] and that his company had no recent interaction with BellSouth's collections process.[204] Not surprisingly, after reviewing the documents produced in Response to Interrogatory No. 117, Mr. Russell admitted that there is no guesswork involved in the example of Bellsouth's collections process he reviewed on the stand in Florida.[205] Indeed, in ruling in favor of BellSouth on this issue, the Florida Commission and the Mississippi Arbitration Panel correctly concluded that the Joint Petitioners' hypothetical concerns about perceived guesswork were insufficient reasons for not requiring payment of undisputed amounts owed.[206]

---

202 BellSouth's Response to FL Staff Interrogatory No. 117 (which includes several BellSouth aging reports) is attached to Blake's Rebuttal Testimony as Exhibit KKB-8. In other proceedings, the Joint Petitioners have attempted to question the fact that the BellSouth collections organization remains in constant contact with a CLEC that owes undisputed amounts past due by citing to a $65 past due notice received by NuVox. Of course, the NuVox witness testified that NuVox timely pays all BellSouth bills and therefore has had no recent contact with BellSouth collections organization. (FL Tr. at 264-265). In any event, the $65 past due notice was an isolated incident that was resolved without any service disruption.

203 FL Tr. at 267.

204 FL Tr. at 265.

205 FL Tr. at 268-269. In an attempt to undermine the aging report, Joint Petitioners will likely point out that the report is not an official BellSouth document. *See* SC Tr. at 537. This point is irrelevant. The aging report is an information tool that reminds CLECs of undisputed amounts that they have failed to timely pay--the amount owed is plainly provided for in previously issued bills. *See* Blake Rebuttal Testimony at 42. Further, whether the aging report is an official document or not has no impact whatsoever on BellSouth's commitment to tell Joint Petitioners what amounts they must pay to avoid service disruption. *See* BellSouth Exhibit A, Att.7, § 1.7.2.

206 *Florida Order* at 65 ("we find it reasonable to require that any other past due undisputed amounts be paid as well by the due date on the treatment notice."); *Mississippi Order* at 38 (concluding that "a CLEC should be required to pay past due undisputed amounts in addition to

Based on experience in other states, BellSouth expects that the Joint Petitioners will claim that BellSouth's proposed language is somehow inconsistent with federal law regarding FCC certification requirements in 47 U.S.C. § 214(a).[207] Such an assertion is a red herring. 47 U.S.C. § 214(a) is a *certification statute* that provides that "[n]o carrier shall undertake the construction of a new line . . .[without first obtaining] . . . a certificate that the present or future public convenience and necessity require or will require the construction [of such] line." The statute goes on to provide that in certain circumstances FCC authorization is required before a carrier discontinues providing service to a community.[208] This issue has nothing to with FCC certification requirements for providing (or discontinuing) service to a community and thus is entirely inapplicable to the instant dispute.

In other proceedings, the Joint Petitioners have argued that BellSouth builds into the "collections game" guesswork as to whether disputes will be properly and timely recognized, and as to when BellSouth will recognize receipt of payment. As explained above, however, there is no guesswork in BellSouth's collections process. Additionally, the parties have agreed that "[p]ayment is considered to have been made when received by the billing party."[209] Thus, there is no issue regarding when payment is made or recognized.

The Joint Petitioners may also claim that BellSouth has, in the past, failed to timely post payment. Mr. Russell, however, conceded that timely posting of payment is not one of the 107 issues that Joint Petitioners identified in its arbitration petition filed in March 2005 (after years

---

those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination."). The Georgia, Kentucky, and North Carolina Commissions ruled in favor of Joint Petitioners on this Issue.

[207] In any event, the parties have agreed to comply with applicable FCC and Commission rules and orders regarding suspension or termination of service. Att. 7, § 1.7.4. To date, Joint Petitioners have failed to articulate how BellSouth's proposed language runs afoul of such rules.

[208] *Id.*

[209] Att. 7, § 1.4.

of contract negotiations),[210] and there is no evidence to support this claim. Further, and similar to Joint Petitioners' testimony on many issues, Joint Petitioners offered no specific example of late posting of payments by BellSouth or how such alleged late posting harmed Joint Petitioners.[211]

Accordingly, the Commission should disregard Joint Petitioners' unsupported assertion about collections "shell games" and allow BellSouth to protect its financial interest by giving BellSouth the right to discontinue providing service to any Joint Petitioner that fails to timely pay undisputed amounts. Holding otherwise would allow the Joint Petitioners to have a revolving extension for payment of undisputed, past due amounts; a privilege *not* afforded to others similarly situated in the industry.

Issue 101: How many months of billing should be used to determine the maximum amount of the deposit? (Attachment 7, Section 1.8.3)

The maximum amount of a deposit should not exceed an average of two months of actual billing for existing customers or two months estimated billing for new customers.[212] BellSouth's proposal of a deposit of no more than two months of a CLEC's actual or estimated billings is consistent with the maximum deposit amount contained in the South Carolina tariffs of BellSouth, the Joint Petitioners,[213] and with the Commission's regulations addressing

---

210 SC Tr. at 538-539.

211 Additionally, Joint Petitioners provided no evidence or examples to support their purported concern that BellSouth will exercise its collections and termination rights in a coercive and inappropriate manner.

212 BellSouth is not opposed to using billing associated with the most recent six month period to establish the maximum deposit amount.

213 Blake SC Rebuttal Testimony at 47-48 (SC Tr. at 305-306); BellSouth SC Tariff § A2.4.2, attached as Exhibit KKB-2; NuVox SC Tariff § 2.6.1(A); Xspedius SC Tariff § 2.5.4(A)(1); KMC SC Tariff § 2.5.4(A)(1), collectively attached as KKB-1 to Blake Direct Testimony). Joint Petitioners presented no evidence or examples to support their assertion that they "often must reduce or waive deposits in order to win business." (Joint Petitioners' SC Rebuttal Testimony at 74).

deposits.[214] It also is consistent with the rulings reached by the Commissions of Georgia, Florida, and North Carolina, and the Mississippi Arbitration Panel.[215]

It is undisputed that BellSouth has a right to a deposit (or to demand an additional deposit) if any Joint Petitioner fails to meet the specific and objective deposit criteria set forth in Attachment 7, Section 1.8.5.[216] Further, it cannot be disputed that a deposit reduces BellSouth's potential losses if a Joint Petitioner (or any CLEC that adopts a Joint Petitioner's interconnection agreement) ceases to pay its bills. Specifically, a two months' deposit is necessary because BellSouth must wait over two months (74 days) before disconnecting service for non-payment under the provisions of this agreement.[217] Reserving the right to require a deposit of up to two months' billing is necessary and demonstrates sound business judgment, as recognized by Joint Petitioners adopting this same standard for their South Carolina customers.

Additionally, the Joint Petitioners' opposition to BellSouth's proposed maximum deposit amount disregards the Parties' experience. First, the Joint Petitioners have no maximum deposit amount in their current interconnection agreements.[218] Second, Joint Petitioners acknowledge having existing deposits with BellSouth that are substantially less than two months billing.[219]

---

214 S.C. Code Regs. 103-621.2.

215 *Georgia Order at 34; Florida Order* at 68; *North Carolina Order* at 87; *Mississippi Order* at 40. The Kentucky Commission adopted the Joint Petitioners' position on this Issue.

216 The agreed-upon deposit criteria terms take into account a CLEC's payment history, and other objective financial measurements, such as liquidity status (based upon a review of EBITDA) and bond rating (if any). As such, BellSouth is at a loss as to why Issue 101 remains unresolved. In any event, the payment history for some of the Joint Petitioners is poor. An established business relationship that includes a poor payment history does not warrant a reduced maximum security amount nor does it reduce BellSouth's risk in providing service to such Joint Petitioners (or high-credit risk CLECs that may adopt a Joint Petitioner's interconnection agreement).

217 FL Tr. at 907-908; BellSouth Response to FL Staff Interrogatory No. 118; Blake Rebuttal Testimony at 46 (SC Tr. at 304).

218 Joint Petitioners Response to FL Staff Interrogatory No. 67.

219 Russell Depo. at 226-227; Falvey, Depo. at 314. In fact, Mr. Russell acknowledged that

Third, and completely contrary to the assertion that BellSouth is continually trying to extract unreasonable deposits from the Joint Petitioners, witness Russell admitted that, in 2003, BellSouth reduced NuVox's deposit by 44% ($1.8 million letter of credit reduced to $1 million letter of credit and reduced NewSouth's deposit by 75% ($2.4 million cash deposit reduced to $600,000 cash).[220] Once again, the facts do not support the Joint Petitioners' position.

Further, the Joint Petitioners' request for a lower maximum deposit amount for existing CLECs overlooks the fact that a new CLEC may be in stronger financial shape than an existing CLEC and that the financial health of an existing CLEC can deteriorate.[221] Moreover, this statement ignores the fact that "BellSouth has written off over $23 million owed by CLECs that filed for bankruptcy."[222]

In addition to allowing BellSouth to minimize its financial exposure in the event of non-payment or default by a CLEC, a two month maximum deposit amount is reasonable given that BellSouth will refund, return, or release any security deposit within 30 calendar days of determining that a Joint Petitioners' creditworthiness indicates a deposit is no longer necessary.[223] And while the Joint Petitioners assert that a two month deposit term "usually

---

NuVox's current deposit with BellSouth (a $1 million letter of credit and $600,000 cash) is substantially less than NuVox's two months billings with BellSouth (around $6 or 7 million). (FL Tr. at 247).

220 *See* Joint Petitioners Response to FL Staff Interrogatory No. 68; FL Tr. at 248.

221 FL Tr. at 909. Joint Petitioners may claim that BellSouth has not attempted to assert that Joint Petitioners have a payment history that aggravates BellSouth's financial risk. Such an assertion cannot be reconciled with the facts. As Mr. Russell conceded, (FL Tr. at 269), BellSouth's Response to FL Staff Interrogatory No. 117 describes BellSouth's recent attempts to collect over $231,000 from another Joint Petitioner.

222 Blake Rebuttal Testimony at 49 (SC Tr. at 307).

223 *See* Att. 7, § 1.8.10. By comparison, the Commission's regulations allow telephone utilities to retain a retail customer's deposit until they have maintained a good credit status for two years. S.C. Code Regs. 103-621.5.

come[s] with an automatic refund upon 12 months of good payment,"[224] such so-called "ordinary" deposit provisions apparently do not apply to the South Carolina customers of Xspedius or KMC. Specifically, neither the Xspedius nor the KMC SC tariff requires the return of a customer's deposit upon the establishment of a good payment history.[225] In any event, Joint Petitioners' deposit refund complaint is irrelevant because the parties have agreed that BellSouth will refund, return, or release any security deposit within 30 calendar days of determining that a Joint Petitioners' creditworthiness indicates a deposit is no longer necessary.[226]

Joint Petitioners also argue that BellSouth's proposal should be rejected because deposits tie up capital.[227] However, NuVox has no problem using capital to post bonds totaling $1.75 million in an effort to prevent BellSouth from exercising its EEL audit rights, even though NuVox claims that all of the EELs it orders comply with the law.[228] And while the Joint Petitioners assert that they are willing to accept the maximum deposit cap agreed to between ITC^DeltaCom and BellSouth,[229] they fail to disclose that *Joint Petitioners rejected the payment and deposit terms agreed to between DeltaCom and BellSouth.*[230] Additionally, while the Joint Petitioners go to great lengths to point out that BellSouth has agreed to lesser maximum deposit

---

224 Joint Petitioners Rebuttal Testimony at 73 (SC Tr. at 187).

225 Xspedius SC Tariff § 2.5.4 and KMC SC Tariff § 2.5.4.

226 *See* Att. 7, § 1.8.10.

227 Joint Petitioners Direct Testimony at 89 (SC Tr. at 104).

228 GA Tr. at 462. *NuVox and NewSouth v. North Carolina Utilities Commission and BellSouth*, No. 5:05-CV-207-BR(3), United States District Court, Eastern District of North Carolina, Order for Preliminary Injunction granted April 4, 2005 ("preliminary injunction will become effective only upon plaintiffs' posting of appropriate security in the amount of $1.5 million with the Clerk."); *NuVox v. BellSouth & Kentucky Public Service Commission*, C/A No. 05-41-KKC, United States District Court, Eastern District of Kentucky, Temporary Restraining Order granted July 1, 2005 ("As security for the issuance of this Order, Plaintiff NuVox is required to post a bond in the amount of $250,000").

229 Joint Petitioners Rebuttal Testimony at 72.

230 FL. Tr. 1065; 1067-1068; GA Tr. at 545; Blake Rebuttal Testimony at 46-47; Exhibit KKB-9.

amount with DeltaCom, they attempt to hide the fact that NewSouth (i.e. NuVox following NewSouth/NuVox merger) recently agreed to a *three-month security deposit* amount with AllTel.[231]

For all of these reasons, the Commission should adopt BellSouth's language for Issue 101.

Issue 102: Should the amount of the deposit BellSouth requires from CLEC be reduced by past due amounts owed by BellSouth to CLEC? (Attachment 7, Section 1.8.3.1)

As a general matter, a CLEC deposit should not be reduced by amounts allegedly owed by BellSouth to such CLEC.[232] The CLEC's remedy for addressing late payment by BellSouth should be suspension/termination of service and/or application of interest/late payment charges.[233] BellSouth is within its rights to protect itself against uncollectible debts on a non-discriminatory basis.[234] Deposits are needed to mitigate the risk that a CLEC may not be able to fulfill its financial obligations in the future.[235] BellSouth attempts to collect a deposit amount that is consistent with that risk. For BellSouth to do otherwise would not protect the interests of BellSouth's shareholders, employees, or other customers. Indeed, every state commission that has ruled on this issue has uniformly agreed with BellSouth on this issue.[236] The Commission should likewise reject the Joint Petitioners' position.

---

231 SC Tr. at 548; Blake Rebuttal Testimony at 47; Exhibit KKB-11 (entire NewSouth/AllTel interconnection agreement).

232 FL Tr. at 913-914.

233 *Id.*

234 *Id.*

235 *Id.*

236 *Florida Order* at 70("We find that reducing the deposit BellSouth requires from the Joint Petitioners by past due amounts owed by BellSouth is not appropriate."); *Mississippi Order* at 43 ("The amount of the deposit BellSouth requires from CLEC should not be reduced by past due amounts owed by BellSouth to CLEC."); *Georgia Order* at 35-36 (accepting Staff's recommended "adoption of BellSouth's proposal . . . ."); *Kentucky Order* at 19 ("Commission finds that the issue of the amount owed by a CLEC to BellSouth and the amount owed to a

Additionally, the Joint Petitioners' proposal unreasonably and unacceptably fails to exclude amounts that are subject to a valid billing dispute.[237] In support of their offset proposal, Joint Petitioners (i.e. Xspedius) rely on outdated and inaccurate information.[238] Without providing any specifics, Joint Petitioners assert that the offset provision is necessary because, many years ago, BellSouth allegedly owed a now defunct CLEC (e.spire) millions for reciprocal compensation.[239] Of course, and as with many issues, the specifics do not support the Joint Petitioners' position. Ms. Blake testified that BellSouth is current in paying its reciprocal compensation bill.[240] In fact, Xspedius' May 2005 reciprocal compensation bill to BellSouth establishes that BellSouth has overpaid Xspedius.[241] In short, the 2005 bills from Xspedius to BellSouth squarely and convincingly rebut Xspedius' suspect claim that BellSouth has a poor payment history.

Joint Petitioners may claim that excerpts from arbitration rulings in Kansas and Oklahoma support the patently unreasonable proposition that an offset provision should include ***disputed*** amounts owed. As an initial matter, the quoted excerpts say no such thing:[242]

CLEC by BellSouth are distinct issues and declines to accept the Joint Petitioners' position."). *North Carolina Order* at 88 ("Commission concludes that CLPs should not be allowed to offset security deposits by amounts owed to them by another carrier.").

237 FL Tr. at 621.

238 Given the low level of NuVox billings to BellSouth (approximately $1,000 per month) (SC Tr. at 399-400), the offset provision is effectively an Xspedius only issue.

239 Joint Petitioners Rebuttal Testimony at 75 (SC Tr. at 189).

240 Blake Rebuttal Testimony at 50 (SC Tr. at 308) and Exhibit KKB-10.

241 Joint Petitioners' Supplemental Response to FL Staff Interrogatory No. 72, contained two *April 2004* invoices from Xspedius to BellSouth. The first year-old invoice (April 2004 reciprocal compensation bill) showed a total amount due of $2,008,048. The second year-old invoice (April 2004 interconnection transport bill) showed a total amount due of $679,577. These bills were based upon billings beginning in 2003, did not take into account disputed amounts, and ultimately were the subject of a settlement between BellSouth and Xspedius. In any event, Xspedius' ***2005*** bills establish that BellSouth is current. (FL Tr. at 625-626; FL BellSouth Exhibit 21; Blake Rebuttal Testimony at 50, Exhibit KKB-10).

242 After noting that Xspedius claimed that SWBT owed Xspedius $1.9 million (*Kansas*

Additionally, these decisions are irrelevant as there is no evidence that BellSouth owes any past due amount to Joint Petitioners.[243]

That said, in an effort to compromise, BellSouth is willing to agree that when BellSouth makes a deposit demand (or a request for additional deposit) BellSouth will reduce its deposit demand by the undisputed amount past due (if any) owed by BellSouth to any Joint Petitioners for payments pursuant to Attachment 3 of the Interconnection Agreement.[244] Upon BellSouth's payment of such amount, Joint Petitioners would be required to immediately increase the deposit in an amount equal to such payment(s).[245] For the foregoing reasons, the Commission – like every other State Commission that has ruled on this issue -- should adopt BellSouth's position and proposed language for Issue 102.

Issue 103: Should BellSouth be entitled to terminate service to CLEC pursuant to the process for termination due to non-payment if CLEC refuses to remit any deposit required by BellSouth within 30 calendar days? (Attachment 7, Section 1.8.6)

To protect its financial interests, BellSouth should be able to terminate service if a Joint Petitioner fails to pay (or properly dispute) a deposit demand within 30 calendar days. It is undisputed that BellSouth has a contractual right to a deposit.[246] It is undisputed that the parties have agreed to objective and specific criteria that govern BellSouth's right to demand a deposit.[247] Further, it is undisputed that if a Joint Petitioner satisfies the deposit criteria, then

---

Order at 20), the Kansas arbitrator found that "*If its position is accurate,* requiring a deposit of Xspedius would be extremely unfair." *Kansas Order* at 21 (emphasis added); In a similar fashion, an Oklahoma Arbitrator found that "*If SBC owes Xspedius more than $500,000,* then a deposit would not be required until such time as the outstanding balance is reduced below this amount." *Oklahoma Order* at 28-29 (emphasis added).

243 *See* Blake Rebuttal Testimony at 50 (SC Tr. at 308) and Exhibit KKB-10.

244 FL Tr. at 914-915.

245 *Id.*

246 *See* Att. 7, §1.8.

247 *See* Att. 7, § 1.8.5.

BellSouth will refund the deposit amount within 30 calendar days, plus accrued interest.[248] Accordingly, it logically follows that if a Joint Petitioner fails to satisfy the objective and specific deposit criteria, thereby triggering BellSouth's right to a deposit, then BellSouth should be permitted to terminate service if a Joint Petitioner refuses to respond to a deposit demand within 30 calendar days. The Florida Commission, the North Carolina Commission, and the Mississippi Arbitration Panel all agree, as they adopted BellSouth's position on this issue.[249]

Termination for non-payment of a deposit is not a novel concept; it is expressly authorized by this Commission and, for example, the Florida Commission[250] and the end user tariffs of the Joint Petitioners expressly authorize termination for non-payment of "any amounts owing to the Company."[251] Additionally, thirty calendar days is a reasonable time period for a Joint Petitioner to satisfy an undisputed demand for a deposit.[252] Every month, BellSouth provides services worth millions of dollars to the Joint Petitioners. While the Joint Petitioners are valued customers, BellSouth has a responsibility to its shareholders and to its other customers to avoid unnecessary business risks. Continuing to provide service to a Joint Petitioner that fails to respond or ignores a deposit demand (or a request for an additional deposit) is such a risk.

Again, given that it takes approximately 74 days for BellSouth to terminate for non-payment[253] and that the parties have agreed to specific and objective criteria as to when a deposit

---

248 *See* Att. 7, § 1.8.10.

249 *Florida Order* at 73; *North Carolina Order* at 90; *Mississippi Order* at 45. The Georgia and Kentucky Commissions did not adopt BellSouth's position on this Issue.

250 *See* S.C. Code Regs. 103-625; FL Tr. at 256-257.

251 NuVox SC Tariff, § 2.7.3(A); Xspedius SC Tariff § 2.5.5(A); KMC SC Tariff § 2.5.5(A).

252 Joint Petitioners remain confused about the scope of Issue 103. Issue 103 has nothing to do with disputes. Rather Issue 103 addresses BellSouth's rights if a Joint Petitioner disregards or simply ignores a deposit demand.

253 Blake Rebuttal Testimony at 46 (SC Tr. at 304).

is required,[254] allowing BellSouth to terminate service in situations where a deposit demand is ignored is a reasonable and necessary contractual right. Accordingly, the Commission should adopt BellSouth's proposed language on Issue 103.

Issue 104: What recourse should be available to either Party when the Parties are unable to agree on the need for or amount of a reasonable deposit? (Attachment 7, Section 1.8.7)

The Parties have settled this issue and thus it is no longer the subject of the arbitration proceeding.

CONCLUSION

For all the reasons stated herein the Commission should adopt BellSouth's positions on each of the issues in dispute. BellSouth's positions on these issues are reasonable and consistent with the 1996 Act, which cannot be said about the positions advocated by the Joint Petitioners. With few exceptions, the issues that the Joint Petitioners have brought before the Commission have little or nothing to do with the Joint Petitioners providing local service to South Carolina consumers. Rather, the Joint Petitioners' issues serve mainly to shift their costs of doing business in South Carolina to BellSouth. For the foregoing reasons, BellSouth requests that the Commission rule in BellSouth's favor on each arbitration issue.

---

254 Att. 7, § 1.8.5.

Respectfully submitted this 27th day of July, 2006.

PATRICK W. TURNER
General Counsel-South Carolina
1600 Williams Street
Columbia, South Carolina 29201
(803) 401-2900

ROBERT A. CULPEPPER
BellSouth Center - Suite 4300
675 West Peachtree Street, N.E.
Atlanta, GA 30375
(404) 335-0841

ATTORNEYS FOR
BELLSOUTH TELECOMMUNICATIONS, INC.

642301

STATE OF SOUTH CAROLINA)
) CERTIFICATE OF SERVICE
COUNTY OF RICHLAND)

The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, Inc. ("BellSouth") and that she has caused BellSouth's Post-Hearing Brief in Docket No. 2005-57-C to be served upon the following this July 27, 2006:

Florence P. Belser, Esquire
General Counsel
Office of Regulatory Staff
Post Office Box 11263
Columbia, South Carolina 29211
(U. S. Mail and Electronic Mail)

Nanette S. Edwards, Esquire
Office of Regulatory Staff
Post Office Box 11263
Columbia, South Carolina 29211
(U. S. Mail and Electronic Mail)

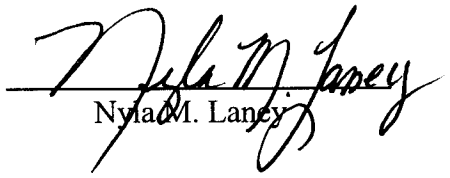
F. David Butler, Esquire
Senior Counsel
S. C. Public Service Commission
Post Office Box 11649
Columbia, South Carolina 29211
(PSC Staff)
(U. S. Mail and Electronic Mail)

Jocelyn G. Boyd, Esquire
Staff Attorney
S. C. Public Service Commission
Post Office Box 11649
Columbia, South Carolina 29211
(PSC Staff)
(U. S. Mail and Electronic Mail)

Joseph Melchers
Chief Counsel
S.C. Public Service Commission
Post Office Box 11649
Columbia, South Carolina 29211
(PSC Staff)
(U.S. Mail and Electronic Mail)

John J. Pringle, Esquire
Ellis Lawhorne & Sims, P.A.
Post Office Box 2285
Columbia, South Carolina 29202
(NewSouth, NuVox, KMC, Xspedius)
(U. S. Mail and Electronic Mail)

John J. Heitmann
Stephanie Joyce
Garrett R. Hargrave
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, N.W., Suite 500
Washington, D.C. 20036
(U. S. Mail and Electronic Mail)



Nyla M. Laney

PC Docs # 577384